No. 87-6325-CFH
Status: GRANTED

Docketed:
January 29, 1988

Title: Donald Ray Perry, Petitioner
v.
William D. Leeke, Commissioner, South Carolina Department of Corrections, et al.

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Fairey,W. Gaston

Counsel for respondent: Zelenka,Donald J.

Entry	Date	Note	Proceedings and Orders
1	Jan 29 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 2 1988		Brief of respondent William D. Leeke in opposition filed.
4	Mar 10 1988		DISTRIBUTED. March 25, 1988
6	Mar 28 1988		Petition GRANTED.
			**********
8	Apr 4 1988	G	Motion of petitioner for appointment of counsel filed.
7	Apr 5 1988		DISTRIBUTED. April 15, 1988. (Motion of petitioner for appointment of counsel).
9	Apr 18 1988		Motion for appointment of counsel GRANTED and it is ordered that W. Gaston Fairey, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
10	Apr 26 1988		Joint appendix filed.
11	May 12 1988		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
12	May 12 1988		Brief of petitioner Donald R. Perry filed.
13	May 20 1988		Record filed.
		*	Certified original record, 6 volumes, received.
15	Jun 10 1988		Order extending time to file brief of respondent on the merits until June 29, 1988.
16	Jun 29 1988		Brief of respondent William D. Leeke filed.
17	Jul 25 1988		CIRCULATED.
18	Aug 29 1988		Set for argument. Tuesday, November 8, 1988. (3rd case) (1 hr).
19	Nov 8 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO.: 87-6325

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1987

DONALD RAY PERRY,

PETITIONER,

versus

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and ATTORNEY GENERAL OF SOUTH CAROLINA.

RESPONDENTS.

On Appeal From the United States Court Of Appeals For the Fourth Circuit

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PETITION FOR CERTIORARI - CIVIL CASE

W. GASTON FAIREY, ESQUIRE
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ATTORNEY FOR THE PETITIONER.

NO.:_____

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ATTORNEY FOR THE PETITIONER.

QUESTION PRESENTED

Is a harmless error analysis appropriate where there is a denial of the assistance of counsel during the course of a criminal trial?

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IN THE SUPREME COURT OF THE UNITED STATES

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On Appeal From the United States Court Of Appeals For the Fourth Circuit

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PETITION FOR CERTIORARI - CIVIL CASE

The Petitioner, Donald Ray Perry, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, en banc, in this case.

CITATIONS TO OPINION BELOW

The opinions relevant to this case are reported in State v. Donald Ray Perry, 278 S.C. 490, 299 S.E.2d 324, (S.C. 1983), Perry v. Leeke, an unpublished Opinion of the District Court of South Carolina, Perry v. Leeke,

____F.2d____, No. 86-7645, 4th Cir., en banc, November 5, 1987. All opinions are attached as an Appendix to this Petition.

JURISDICTION

The Court of Appeals issued its Opinion and entered its judgment on November 5, 1987. The Petitioner did not seek a rehearing in that Court. He invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provision of the Sixth Amendment to the United States Constitution provides "[I]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The Petitioner, Donald Ray Perry, was arrested in March of 1981 and charged with Criminal Sexual Conduct in the First Degree, Kidnapping and Murder. Petitioner's trial began on September 21, 1981, and continued through October 2, 1981. On September 29, 1981, the Trial Judge ordered a fifteen (15) minute recess after the Petitioner completed his direct examination and the Trial Court, sua sponte, ordered that the Petitioner not be allowed to consult with his attorney during the break. Petitioner's counsel

objected to the Order but was not allowed to consult with the Petitioner and the trial proceeded subsequent to the break.

The Supreme Court of South Carolina, in affirming Petitioner's conviction, found that the rule of Geders v. United States, 425 U.S. 80 (1976), was not applicable to this situation as a defendant and his attorney would not "normally confer" between direct and cross-examination, and as this denial of counsel did not involve an overnight recess, the rule set forth in Geders was not applicable to this case. The District Court of South Carolina, upon a Writ of Habeas Corpus, found that the Petitioner had been denied his right to counsel as guaranteed by the Sixth Amendment and ordered that the Writ issue unless the Petitioner be retried within a reasonable period of time.

The case came to be heard by the Fourth Circuit Court of Appeals, en banc, which reversed the judgment of the District Court and remanded the case with directions to dismiss the Petition.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fourth Circuit has decided an important constitutional issue which conflicts with prior judgments of this Court and conflicts with the judgment of the Court of Appeals of other circuits.

This case involves an issue not directly addressed

by this Court in it majority Opinion in Geders v. United States, 425 U.S. 80 (1976). It was found in Geders that there was a per se reversal rule when a criminal defendant was prevented from consulting with his attorney "during a seventeen (17) hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not reach, limitations imposed in other circumstances." Id. at 91.

In this case, the Trial Court, after a lengthy direct examination, took a recess of approximately fifteen (15) minutes between Petitioner's direct and cross-examination. Unbeknownst to Petitioner's counsel, the Trial Court, sua sponte, ordered that the Petitioner not be allowed to consult with anyone during the recess including his counsel. Upon attempting to consult with the Petitioner during the break and being denied access, Petitioner's counsel moved for a mistrial for denial of Petitioner's Sixth Amendment right to counsel. At the time of Petitioner's trial, the Fourth Circuit was operating under the rule set forth in United States v. Allen, 542 F.2d 630 (4th Cir. 1976), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir., 1982). In both of these cases, it was found that any denial of counsel during a trial, no matter how brief, was reversible error without inquiry as to any prejudice suffered by a criminal defendant.

Other circuits which have considered this same issue have found that the per se reversal rule of Geders should extend to lesser restrictions on consultation. In United States v. Bryant, 545 F.2d 1035 (6th Cir., 1976), the rule of Geders was extended to cover a one (1) hour lunch recess. In Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir., 1986) (en banc), and United States v. Conway, 632 F.2d 641 (5th Cir., 1980), it was held that the rule of Geders covers any recess no matter how brief. The Eighth Circuit and the District of Columbia Circuit have indicated agreement with a per se rule in dicta. See, Mudd v. United States, 798 F.2d 1509, 1511 (D.C. Cir., 1986); United States v. Vesaas, 586 F.2d 101, 102, n. 2 (8th Cir., 1978).

Only the Second Circuit has indicated that harmless error may be applied to this situation but its ruling was very limited. In United States v. Dilapi, 651 F.2d 140 (2nd Cir., 1981), that Court refused to reverse based upon the refusal of the trial court to allow a five (5) minute consultation in the middle of defendant's cross-examination after finding that there was "not even a remote risk of actual prejudice." The Court went on, however, to find that "we need not determine whether a similar instruction would require reversal in cases arising hereinafter without regard to actual prejudice. It is sufficient to state that the instruction should not be given again." Id. at 149.

The Majority opinion in this case found that while the prior precedent of the Fourth Circuit would indicate that a prejudice inquiry was not appropriate in cases of this type, the Supreme Court's recent decisions in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984), required a reexamination of per se reversal rules in cases involving denial of counsel. (Appendix C, infra p. 8). The Majority's interpretation of Strickland and Cronic was that the underlying purpose of the Sixth Amendment was to ensure fair trials and that in analyzing claims alleging violations of this right, the Court should always focus on prejudice. It was found that automatic reversal was only warranted where prejudice could be presumed. (Appendix C, infra p. 9). The Majority found the Petitioner to be competently represented at trial, the restriction to be brief and during an unscheduled recess, and, therefore, the per se rule of Geders to be inapplicable to this case. (Appendix C, p. 10-12).

The Majority also found, upon review of the record, that the "possibility of prejudice is utterly remote" (Appendix C, p. 17-18) and found that no evidentiary hearing was necessary based upon the record of the case.

In dissent, Chief Judge Winter found the Majority's reliance upon Strickland and Cronic to be misplaced. If

anything, the dissent found these cases to support the proposition that any denial of counsel in a critical stage required a per se rule of prejudice.

Additionally, the Dissent found that by adopting a harmless error inquiry in denial of counsel situations, the majority had invited intrusion into the attorney/client relationship, citing the holdings in Bailey v. Redmond, 657 F.2d 21, 24 (3rd Cir., 1981) and Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir., 1986).

Chief Judge Winter found no quantitative difference between the recess issue herein and the recess involved in Geders as, in both instances, the criminal defendant and his counsel would normally confer. (Appendix C, p. 29).

The Dissent found that "[a]ny deprivation of the right to counsel, a right which lies at the foundation of our system of criminal justice, warrants reversal without proof of prejudice, and the Supreme Court has consistently so held." (Appendix C, p. 32).

The opinion by the Majority substantially expands the scope of the ruling of this Court in Strickland and Cronic. Those decisions addressed the continuing problem in criminal appeals of a determination of whether counsel for criminal defendants competently performed their duty under the Sixth Amendment to the United States Constitution. The standards enunciated by these decisions deal with trial

counsel errors and do not involve errors by the trial court. Strickland and Cronic both indicate that this Court has uniformly found constitutional error without any showing of prejudice when a criminal defendant has been deprived of counsel. Cronic, 466 U.S. at 659, n. 25; Strickland, 466 U.S. at 692.

This Court has consistently and zealously guarded the right to counsel for criminal defendants. It has repeatedly been held to be one of those constitutional rights which are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967). The Majority Opinion of the Fourth Circuit seriously erodes this fundamental principle of law and deprives this Petitioner of a fair trial.

CONCLUSION

The judgment below, while novel in its reasoning, presents a substantial departure from clearly established law that deprivation of counsel during a critical stage of a criminal proceeding is constitutionally impermissible. It conflicts with prior decisions of this Court and with the decisions of the other circuits. Its requirement of a showing of prejudice represents a dangerous intrusion upon the attorney/client privilege and invites arbitrary determinations as to prejudice. The fundamental nature of

the error in this case strikes at the very heart of our adversary system. This Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted, this the 29th day of January, 1988, in Columbia, South Carolina.

FAIREY & PARISE, P. A.

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Attorney for the Petitioner

A P P E N D I X

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Donald Ray Perry, ... Appellant.

Appeal From Richland County
Julius H. Baggett, Judge

Opinion No. 21836
Filed January 3, 1983

AFFIRMED IN PART;
REVERSED IN PART.

Deputy Appellate Defender David W. Carpenter, of S. C. Commission of Appellate Defense; and W. Gaston Fairey and Assistant Public Defender Edward Mullineaux, all of Columbia, for appellant.

Attorney General Daniel R. McLeod, and Assistant Attorneys General Harold M. Coombs, Jr., and Martha L. McElveen; and Solicitor James C. Anders, all of Columbia, for respondent.

LITTLEJOHN, A. J.: Appellant Donald Ray Perry was indicted and convicted of (1) murder, (2) kidnapping and (3) criminal sexual conduct in the first degree. The jury at the conclusion of the penalty phase of the bifurcated trial, recommended a sentence of life in prison for murder. The trial judge sentenced Appellant to consecutive sentences of confinement of (1) life for murder, (2) life for kidnapping, and (3) thirty years for criminal sexual conduct, first degree. Appellant appeals.

On the evening of March 5, 1981, Dr. Mary Heimberger had dinner with two friends at a restaurant in Richland County. After having dinner, she left the restaurant alone in her own automobile. Her associates became alarmed the next day when she failed to report to work. Police officers were notified and began a preliminary investigation of her disappearance.

Two young boys subsequently found her dead body in a wooded area and notified the authorities. Upon examination of the victim's body, it was found that she had been sexually assaulted and shot to death. Appellant was arrested, charged and convicted of the murder, kidnapping and criminal sexual assault of the victim.

The first question of alleged trial error submits that:

> The trial court erred, in violation of the Sixth and Fourteenth Amendments to the U. S. Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

It is claimed that the rights of the Appellant, guaranteed by both the United States Constitution and the Constitution of South Carolina have been violated. The United States Constitution provides in relevant part in Article VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

THE STATE v. PERRY

The Constitution of South Carolina provides, in Article I, Section 14, that:

> Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.

We hold that these rights have not been violated.

The incident giving rise to the question happened as follows: at trial, the defense called numerous witnesses including the Appellant himself. After the Appellant completed his direct testimony, the court announced, "court will be in recess for about fifteen minutes." The judge ordered that the Appellant not speak to his attorney during the recess. Consultation not being permitted, counsel for the defense moved for a mistrial contending that the Appellant had been denied adequate representation of counsel because the court denied him the right to talk to his client between the direct examination and the cross examination--a period of about fifteen minutes.

The right of an accused person to be adequately represented by counsel is fundamental. Cases need not be cited for the proposition that the denial of right to counsel is of such constitutional magnitude as to command a new trial. The question we must answer in this case, framed differently from that stated by the Appellant, is whether the judge's denial of brief consultation after direct examination and before cross examination violated the Appellant's constitutional right to a fair trial so as to necessitate the case be tried again. Counsel for the Appellant relies largely upon the case of Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) to support his claim of reversible error. In that case, there was an overnight recess, a total of approximately seventeen hours, during which time the trial judge instructed counsel and client to refrain from conferring with each other. Mr. Chief Justice Burger, speaking for the Court, held the sequestration under these circumstances to be reversible error, saying:

> The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would *normally confer* with counsel. *We need not reach, and we do not deal with limitations imposed in other circumstances.* We hold that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.
> (Emphasis added.)

We attach significance to the words "normally confer". Normally, counsel is not permitted to confer with his defendant client between direct examination and cross examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross examination begins, the judge would and should unhesitatingly deny the request. The fact that the court did not wish to declare a completely inflexible rule is emphasized by the second footnote. The Court preceded the footnote with this statement in the opinion:

> Other courts have concluded that an order preventing a defendant from consulting his attorney during an overnight recess infringes upon this substantial right.

The footnote then added:

> United States v. Leighton, 386 F.2d 822 (CA 2 1967), on which the Court of Appeals relied, involved an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day, a matter we emphasize is not before us in this case.

Our affirmance of the case is not inconsistent with Geders.

Nor, do we think that the other case upon which counsel largely relies for reversal justifies a new trial. That case is United States v. Allen, 542 F.2d 630 4th Cir. (1976) U.S., cert. denied, 430 U.S. 908. Therein, A. D. Allen, Jr., Ann Allen and Aubry Joe Allen were on trial for causing stolen merchandise to be transported in interstate commerce. All were convicted. During the trial, Ann Allen was denied the right to confer with counsel overnight (same as Geders). A. D. Allen was denied the right to confer with counsel during a twenty-minute recess. The Fourth Circuit Court of Appeals reversed the conviction of Ann Allen. It affirmed the conviction of A. D. Allen. In so ruling, the Court said:

> We agree and hold that a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible, but we apply the new rule prospectively only.

It is obvious that the Court followed Geders in reversing the conviction of Ann Allen. It is equally obvious that the Court used the case of A. D. Allen as a vehicle for declaring a new rule of court extending Geders and actually inconsistent with the intimations therein. The ruling will, we suppose, be binding on the trial judges in the Fourth Circuit until the Supreme Court of the United States decrees otherwise. The prospective ruling is not in any event binding on the Supreme Court of South Carolina. The United States Supreme Court was meticulous in Geders in refraining from declaring the rule which the Fourth Circuit Court of Appeals later promulgated prospectively. If we should follow the prospective ruling, which we refuse to do, we would merely hold that Appellant's conviction is affirmed and declare a rule prospectively. Prospective rulings are sometimes appropriate but should be promulgated sparingly. Certainly, this Court should not promulgate a rule even prospectively with which we are not in accord. Extensions of the rule substitute form for substance and disregard the basic proposition that Appellant in this case simply was not denied a fair trial. He was entitled to a fair trial but not a perfect one.

We are more in agreement with the reasoning of the Court in the case of United States v. DiLapi, 651 F.2d 140 (2d Cir. 1981), wherein the Second Circuit Court of Appeals held that even if a brief denial of the right to confer with counsel existed, there was not even a remote risk of actual prejudice. Assuming without so holding that denial of right to confer with counsel for some given period of time might warrant a finding of prejudice per se, the constitutional guarantees do not require a presumption of prejudice under all circumstances whatsoever. Such is consistent with both Geders and the result, if not the prospective rule, in Allen.

Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences "a feel of the case" which oftentimes may not be detected from a cold printed record. When counsel for Appellant moved for a mistrial on the basis of the trial judge's directive, the trial judge gave a well-reasoned explanation for his actions:

> . . . Mr. Perry has testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and accept full responsibility for it. . . .

Next, Appellant challenges the admission in evidence of certain statements given by him to police officers. Appellant argues his constitutional rights to silence and self incrimination were violated by the police in obtaining these statements from him.

The trial judge made a finding that Appellant's statements were free and voluntary. The finding is abundantly supported by the record. Appellant never in any manner invoked his right to silence, which would have prevented further interrogation by

the authorities. It is our conclusion that the statements admitted at the trial were not obtained in violation of Appellant's constitutional rights.

Appellant further argues that the Solicitor's closing argument was improper and constituted reversible error. We find that the State's closing argument is well within the perimeters as set forth by the previous rulings of this Court. We find no error.

The Appellant argues, finally, that the trial court erred in sentencing him to life in prison for kidnapping. We agree and vacate only the kidnapping life imprisonment sentence. The Code of Laws of South Carolina (Cumm. Supp. 1981), §16-3-910 defines kidnapping and provides the punishment as follows:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony and upon conviction, shall suffer the punishment of life imprisonment *unless sentenced for murder as provided in* §16-3-20. (Emphasis added.)

Inasmuch as the Appellant has been sentenced to life imprisonment for murder (which we affirm), the Code section precludes a life imprisonment sentence for kidnapping. We so held in State v. Copeland, et. al., filed November 10, 1982.

In summary, we vacate the life imprisonment sentence for kidnapping because of the statutory provision. The statute does not mandate a vacation of the kidnapping conviction. It merely provides that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment. The kidnapping conviction is, accordingly, affirmed. We affirm the conviction and sentence of the Appellant for murder and for criminal sexual assault first degree.

AFFIRMED IN PART.

REVERSED IN PART.

LEWIS, C.J., GREGORY and HARWELL, JJ., concur. NESS, A.J., dissents.

NESS, A.J. (dissenting): I disagree.

As the majority points out, the Supreme Court in Geders, supra, held that an order preventing a defendant from consulting with counsel during an overnight recess, when an accused would normally confer with counsel, is constitutionally impermissible. The majority properly attaches particular significance to the words "normally confer," but then misplaces the analogy.

The majority distinguishes the present case from Geders by observing that counsel is not normally permitted to confer with the defendant between direct and cross-examination. I fail to see the distinction, as the recess in Geders also occurred between direct and cross-examination. Rather, the Geders court recognized a defendant would normally confer with counsel during an overnight recess; likewise, a defendant would normally confer with counsel during a short routine recess.

I agree with the Fourth Circuit decision in State v. Allen, supra, which held the Sixth Amendment right to counsel is so fundamental that it should never be interfered with for any length of time absent some compelling reason. See also Stubbs v. Bordenkircher, 689 F. 2d 1205 (4th Cir. 1982). To allow defendants to be deprived of counsel during court-ordered recesses is to assume the worst of our system of criminal justice, i.e., that defense lawyers will urge their clients to lie under oath. I am unwilling to make so cynical an assumption, it being my belief that the vast majority of lawyers take seriously their ethical obligations as officers of the court.

Even if that assumption is to be made, the Geders opinion pointed out that opposing counsel and the trial judge are not without weapons to combat the unethical lawyer. The prosecutor is free to cross-examine concerning the extent of any "coaching," or the trial judge may direct the examination to continue without interruption until completed. Additionally, as noted in Allen, a lawyer and client determined to lie will likely invent and polish the story long before trial; thus, the State benefits little from depriving a defendant of counsel during short recesses.

I think the Sixth Amendment right to counsel far outweighs the negligible value of restricting that right for a few minutes during trial. I would hold that a restriction on a defendant's right to consult with his attorney during even a brief rountine recess is constitutionally impermissible and reverse.

REVERSED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

DONALD RAY PERRY,

Petitioner,

vs.

WILLIAM D. LEEKE, Commissioner, South Carolina Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Respondents.

CIVIL ACTION NO. 3:85-2992-2

ORDER

This matter is before the court on the petition of state prisoner Donald Ray Perry for habeas corpus relief. The petition is before the court with the report and recommendation of the United States Magistrate, made in accordance with this court's order of reference and 28 U.S.C. § 636(b). The court is charged with making a de novo determination of any portions of the magistrate's recommendation to which specific objection is made; and it may accept, reject, or modify, in whole or in part, the recommendations made by the magistrate or recommit the matter to the magistrate with instructions.

#1 cert.

In this case, the magistrate recommends that the writ issue unless the state elects to retry the petitioner within a reasonable period of time. The magistrate concluded that the petitioner was unconstitutionally denied right to

counsel by the trial judge's order of sequestration during a brief trial recess. The respondents make four objections to the magistrate's report.

First, the respondents object to the magistrate's finding that the petitioner's trial counsel had no opportunity to object to the order of sequestration at the outset; respondents imply that counsel could have expressed an objection to the court during the recess. This objection is without merit. Counsel may have expressed an objection to the court during the recess, but the record reflects an objection was made on the record at the first opportunity following the trial judge's off-the-record, sua sponte issuance of the sequestration order. (Tr. at pp. 771-73, 960-61).

Similarly, repondents' second objection focuses on what is not in the record--whether the defendant requested the assistance of counsel during the recess. Of course, a contemporaneous record of such a request would not be made during a recess. The record does reflect that defense counsel did attempt to talk to the defendant (Tr. at p. 1341 lines 3-7)--apparently to answer a question that the petitioner had and to advise him of his rights on cross-examination (Tr. at p. 1341 lines 18-20). Thus, the respondents' fourth objection is also without merit. The record clearly indicates that petitioner would have conferred with counsel but for the trial judge's prohibition. (Tr. at p. 1341 lines 3-7).

#2 Cert.

Finally, the trial judge's compelling reason for se-

questration, asserted by the respondents in their third objection, is precisely the fear of coaching discounted by the Fourth Circuit in United States v. Allen, 542 F.2d 630, 633-34 (4th Cir. 1976). Although petitioner does not have a right to be coached on cross-examination, the petitioner does have a right to counsel during a brief recess and the petitioner need not demonstrate prejudice from the denial of that right. Stubbs v. Bordenkircher, 689 F.2d 1205, 1206-07 (4th Cir. 1982).

In this case, counsel is on record indicating his desire to answer his client's question during a court recess. The trial judge acknowledged on the record that he did, in fact, prohibit any communcation. Accordingly, the writ shall issue unless the state elects to retry the petitioner within seventy days of the date on which any appeals herefrom become final, or within seventy days of the date on which the time for filing any appeal herefrom expires, whichever occurs last.

AND IT IS SO ORDERED.

#3 Cert.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:
At Florence, South Carolina
June 24, 1986.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-7645

DONALD RAY PERRY,

Plaintiff - Appellee,

versus

WILLIAM D. LEEKE, Commissioner,
South Carolina Department of Corrections;
ATTORNEY GENERAL OF SOUTH CAROLINA,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. C. Weston Houck, District Judge. (CA-85-2992).

Argued: June 1, 1987 Decided: November 5, 1987

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting in banc.*

Donald John Zelenka, Chief Deputy Attorney General for Appellant; W. Gaston Fairey (Fairey & Parise, P.A. on brief) for Appellee.

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*Judge Ervin did not participate in the hearing or decision of this case.

WILKINSON, Circuit Judge:

Donald Ray Perry was convicted of murder, kidnapping, and criminal sexual assault. He sought a writ of habeas corpus on the ground that he was not permitted to confer with his counsel during a fifteen minute trial recess between direct and cross-examination. The district court ordered that the writ should issue unless Perry was retried within a reasonable period. Because any error at the state trial did not prejudice Perry under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), we reverse the judgment of the district court and remand with directions to dismiss this petition.

I.

On March 5, 1981, Mary Heimberger had dinner with two friends at a restaurant in Richland County, South Carolina. After dinner, she left the restaurant alone in her own car. She was not seen again until March 7, when two boys found her dead body in a wooded area. Donald Ray Perry's fingerprint was later found on Heimberger's car; tire tracks from Perry's car were also found on the scene, as were prints of Perry's shoes. After police arrested Perry, he confessed that he had shot Heimberger, but said it was an accident.

A medical examination of Heimberger's body indicated that someone had raped her, attempted to strangle her, shot her in both kneecaps, and then shot her fatally in the chest. The

entrance to her vagina had been bruised and torn. Following Heimberger's death, a large stick had been shoved into her rectum and left there.

Perry's jury trial began on September 21 and ended on October 2. The defense called many witnesses, including Perry himself. On September 29, the trial judge ordered a fifteen minute recess after Perry completed his direct testimony. Perry's counsel sought to speak to him during the recess, apparently to answer a question Perry had and to advise him of his rights on cross-examination. The trial court did not allow the consultation, explaining that Perry "was not entitled to be cured or assisted or helped approaching his cross-examination." Perry's counsel objected, and the objection was overruled.

Perry was convicted. The state of South Carolina sought the death penalty for Perry; the jury recommended a sentence of life imprisonment. On October 5, the trial judge sentenced Perry to life imprisonment for murder, life imprisonment for kidnapping, and thirty years' imprisonment for criminal sexual conduct in the first degree.

Perry argued before the Supreme Court of South Carolina that he had been denied his Sixth Amendment right to counsel because he was not allowed to speak with his lawyer during the fifteen minute recess between direct and cross-examination. The state Supreme Court rejected this argument. Because Perry had been sentenced to life imprisonment for murder, however, that court reversed the sentence for life imprisonment for kidnapping under South Carolina law. State v. Perry, 278 S.C. 490, 299

S.E.2d 324 (S.C. 1983). The United States Supreme Court denied certiorari. Perry v. South Carolina, 461 U.S. 908 (1983).

In November of 1985, more than four years after his trial and more than two and one-half years after the denial of certiorari, Perry sought a writ of habeas corpus in federal district court. The district court granted relief on the basis of our earlier decisions in United States v. Allen, 542 F.2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982), cert. denied, 461 U.S. 907 (1983), which held that it is always reversible error for a trial court to prevent a defendant and his counsel from conferring during a recess, no matter how brief.

We granted en banc review to determine whether Allen and Stubbs continue to govern in light of the Supreme Court decisions in United States v. Cronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984). For the reasons expressed in Allen, we believe the bar order at issue here was error. We also believe, however, that the reasoning of Strickland and Cronic mandates reversal only if that error was prejudicial.

II.

We begin by sketching briefly the legal context. The right to counsel is, without question, a fundamental right of criminal defendants. Some interferences with this right pose such a fundamental threat to a fair trial that reversal of a

conviction is automatic. Cronic, 466 U.S. at 658-59 (1984); Strickland, 466 U.S. at 692; Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Gideon v. Wainwright, 372 U.S. 335 (1963). Not every limitation of the relationship between a defendant and his attorney violates the defendant's right to counsel, however. A trial court is not required, for example, to interrupt trial proceedings whenever a defendant and his attorney express a desire to confer. Moreover, other deprivations at trial, such as ineffective assistance of counsel, do not amount to a denial of the right to counsel requiring automatic reversal of a conviction; such a deprivation constitutes grounds for reversal only if prejudicial. Cronic; Strickland. A barrier to consultation might thus amount to a fundamental denial of the right to counsel, requiring reversal; a lesser deprivation, requiring reversal only if it is prejudicial; or no deprivation at all.

Here we must determine the appropriate treatment of an order barring consultation during a brief, routine recess. The Supreme Court's decision in Geders v. United States, 425 U.S. 80 (1976), is the starting point. Geders held that a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his attorney during an overnight recess. The opinion emphasized the importance of an overnight recess, which gives "the defendant a chance to discuss with counsel the significance of the day's events," to make tactical decisions, and to review strategies for the remainder of the trial. Id. at 88.

The concurring opinion of Justice Marshall, joined by Justice Brennan, argued that the same rule of automatic reversal was "fully applicable to the analysis of any order barring communication between a defendant and his attorney." Id. at 92 (emphasis in original). The opinion of the Court, however, did not go so far. The majority stated that "an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day" was "a matter we emphasize is not before us in this case." Id. at 89 n.2. The Court later repeated this caveat:

> The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not reach, limitations imposed in other circumstances.

Id. at 91.

While there is a division among the circuits, the majority have generally extended the per se reversal rule of Geders to cover lesser restrictions on consultation. The Sixth Circuit has extended Geders to cover a one-hour lunch recess. United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976). The Fifth and Eleventh Circuits have held that Geders covers any recess, no matter how brief. Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986) (en banc); United States v. Conway, 632 F.2d 641 (5th Cir. 1980). The District of Columbia Circuit and the Eighth Circuit have indicated agreement with this view in dicta. Mudd v. United States, 798 F.2d 1509, 1511 (D.C. Cir. 1986); United States v. Vesaas, 586 F.2d 101, 102 n.2 (8th Cir.

1978). The Second Circuit has rejected this view, however, applying harmless error analysis instead. United States v. DiLapi, 651 F.2d 140, 147-48 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982); United States v. Leighton, 386 F.2d 822 (2d Cir. 1967), cert. denied, 390 U.S. 1025 (1968).

In Allen, a panel of this circuit addressed the issue left open by the majority opinion in Geders and adopted the position of Justice Marshall's concurrence. The panel stated that "a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible" and that reversal would be necessary whether or not the restriction was prejudicial. 542 F.2d at 634.

Later, in Stubbs, we qualified Allen slightly to require the petitioner "to show that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." 689 F.2d at 1207. Because the defendant in Stubbs had not objected to the restriction and because neither petitioner nor his attorney had requested permission to confer, the habeas petition was denied. In the present case, Perry's counsel objected to the restriction when he learned of it, so the Stubbs requirement has been satisfied.

III.

It is clear that Allen and Stubbs would govern in this case in the absence of the Supreme Court's recent decisions in

Strickland and Cronic. The Court's analysis of the Sixth Amendment in those cases, however, requires us to reexamine our own analysis in Allen and Stubbs. We believe that the per se reversal rule of those cases cannot be squared with the analysis of Strickland and Cronic, and must be replaced with an inquiry into prejudice.

The Supreme Court held in Strickland and Cronic that ineffective assistance of counsel at trial does not require reversal of a conviction unless the deficient performance of counsel was sufficiently prejudicial. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. At the same time, the Court reaffirmed its previous cases, including Geders, which held that the complete denial of counsel at a critical stage of trial is automatically grounds for reversal. Cronic, 466 U.S. at 659 & n.25.

Strickland and Geders do not imply, however, that Sixth Amendment claims can be mechanically divided into a typology requiring automatic reversal when there is a "denial of counsel" and a prejudice analysis where there is "ineffective assistance." The determinative factor in analyzing a Sixth Amendment claim is not the label to be attached to the alleged deprivation. The Supreme Court has recognized as much by alternately describing Geders as a case involving the denial of counsel, Cronic, 466 U.S. at 659 n.25, and as a case involving ineffective assistance.

Strickland, 466 U.S. at 686.[1] Instead, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Strickland and Cronic held that because the purpose of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," id. at 689, the analysis of claims alleging violations of the right to counsel always focuses on prejudice. Automatic reversal is warranted only where prejudice can be presumed:

> [T]he right to the effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated . . . . There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Cronic, 466 U.S. at 658. See also Strickland, 466 U.S. at 692.

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[1] Other circuits have likewise applied different labels. The Eleventh Circuit, sitting en banc, recently found that a bar on consultation during recess constitutes a denial of the assistance of counsel, requiring automatic reversal. Crutchfield v. Wainwright, 803 F.2d 1103, 1108 (11th Cir. 1986). The Fifth Circuit, ruling prior to United States v. Cronic, 466 U.S. 668 (1984), held that a bar during any recess requires automatic reversal, but cast its rule as a means of protecting the "right to the effective assistance of counsel." United States v. Conway, 632 F.2d 41, 644-45 (5th Cir. 1980). Similarly, the District of Columbia Circuit and the Second Circuit have apparently assumed that the right involved was the right to effective assistance of counsel. Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986); United States v. Leighton, 386 F.2d 822, 823 (2d Cir. 1967), cert. denied, 390 U.S. 1025 (1968).

In Cronic and Strickland, the petitioners contended that they had been deprived of their Sixth Amendment rights because they had been represented by allegedly incompetent or inadequate counsel. Such a deprivation is far more likely to have a prejudicial effect than the deprivation at issue here. Perry had very competent attorneys with whom he was able to confer during an overnight recess the night before and during a luncheon recess immediately prior to his testimony. It would make little sense to maintain a per se rule of reversal for a brief restriction on consultation, but to inquire into prejudice if Perry had been represented incompetently throughout. The existence of prejudice from a restriction such as this one is necessarily tied to the surrounding facts; it cannot be and will not be presumed to have so infected the entire trial that no course other than reversal of this conviction is conceivable.

The quality of Perry's representation belies the need for a rule of automatic reversal. He was represented by two attorneys, Mr. Fairey and Mr. Mullineaux, who were present and active throughout the case. The defense presented some twenty-seven witnesses in Perry's behalf. Cross-examination of government witnesses was vigorous throughout. In all different stages of the trial -- from jury selection through closing argument, from the guilt phase through the sentencing phase -- this defendant was well served and ably represented. The trial judge commended Perry's counsel on the record for their competency and zeal, adding that he hoped "that all my lawyers would be equally prepared and dedicated to their cases." It

would be fa too simplistic to equate this case with those cases where judgment was rendered on an uncounselled defendant and to lump them all together under a "right to counsel" rubric which requires automatic reversal. The law must be sensitive to matters of degree, here the fact that for all but the tiniest fraction of trial time defendant consulted with counsel and was championed by counsel in the best traditions of adversary justice.

Because the state trial proceedings met the requirements of Geders, our holding is consistent with that decision. This was a lengthy trial, and there were eleven different recesses prior to Perry's testimony, including two overnight recesses, one weekend recess, and significantly, a luncheon recess immediately before Perry took the stand. At each of these recesses, there was no restriction on Perry's access to his counsel. During Perry's direct examination, a recess was also held at the request of a juror; Perry was not barred from access to counsel at that time either. After Perry's testimony, there were recesses of varying durations -- fifteen minute recesses, luncheon recesses, and overnight recesses -- during all of which Perry and his counsel were able to consult. Thus the bar order at issue here applied to but one of many recesses, and a brief one at that.

The restriction at issue in Geders posed so great a danger to a fair trial that prejudice could be presumed. Its duration was extreme (a seventeen-hour overnight recess) and it occurred at a time when defendant and his counsel could have

expected to confer. In contrast, the restriction here was not only brief, but occurred during an unscheduled recess during trial. Perry and his counsel had no entitlement to a recess at this time and had no reason to expect a recess to occur by chance between direct and cross-examination. In a majority of instances, cross-examination of a witness follows direct examination without a break. See Geders, 425 U.S. at 90. Because Perry had no entitlement to this recess, the dissenters' speculation on what valuable services counsel may have rendered is simply misdirected. New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult. To reverse automatically a conviction because of an absence of consultation during one brief, fortuitous recess in a trial which spanned nearly two weeks would be to confer a benefit upon a criminal defendant who may not deserve it. The imprecision of a per se approach is thus apparent. The proper inquiry is whether this trial was unfair, whether this defendant suffered prejudice, whether this conviction was infirm -- in short, whether justice was done in this case.

IV.

A per se rule of reversal is "the exception and not the rule" under any circumstances, Rose v. Clark, 106 S. Ct. 3101, 3106 (1986). To promulgate such a rule in these circumstances

would be doubly inappropriate. The Supreme Court has held that "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." Barefoot v. Estelle, 463 U.S. 880, 887 (1983). A federal habeas court must assure itself that state process did not go seriously amiss. The role of the habeas court is not to flyspeck state proceedings, however, but to focus on their "fundamental fairness." Strickland, 466 U.S. at 696.

Collateral review of state convictions by federal courts undermines the finality of those convictions, degrades the prominence of the trial itself, and creates strains in our federal system. See Engle v. Issac, 456 U.S. 107, 127-28 (1982). Most serious here, though, are the costs associated with retrying a defendant who obtains habeas relief. While the district court's order might result in a retrial rather than release for Perry, the "[p]assage of time, erosion of memory, and dispersion of witnesses" may as a practical matter make a second prosecution difficult. Id.

Even if an effective retrial is possible, it imposes enormous costs on courts and prosecutors, who must commit already scarce resources "to repeat a trial that has already once taken place." United States v. Mechanik, 106 S. Ct. 938, 942 (1986). It imposes costs on victims who must "relive their disturbing experiences." Id. at 942. See also Morris v. Slappy, 461 U.S. 1, 14 (1983). While "prejudical error" would require a retrial regardless of the inconvenience, id., those who participated in the initial proceedings should not be compelled

to confront these dreadful events a second time if the first trial has been fair. Retrials, moreover, may lack the reliability of the initial trial where witness testimony was unrehearsed and witness recollections were more immediate.

The costs associated with retrial, and the possibility that changed circumstances may make retrial less reliable or even impossible, Engle, 456 U.S. at 127-28, are likely to be especially high in this case. Perry did not file his petition for a writ of habeas corpus until more than four years after his trial and more than two and one-half years after the Supreme Court denied his petition for certiorari. As the Supreme Court noted in Mechanik, these costs "are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has no effect on the outcome of the trial." 106 S. Ct. at 943.

V.

The sole remaining issue, therefore, is whether Perry suffered prejudice because of the state court's bar order. We hold that he did not.

The standard of prejudice under Strickland is whether defendant received a "fair trial" in which "evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."

Strickland, 4to U.S. at 685. On the basis of the record before us there can be no legitimate fear that the trial court's order jeopardized Perry's "ability . . . to receive a fair trial," Cronic, 466 U.S. at 658, and there can be no doubt that Perry received "the assistance necessary to justify reliance on the outcome" of his trial. Strickland, 466 U.S. at 692.

There is no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross-examination. There is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior to his taking the stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course" necessary. Further, it is clear from the record that Perry took full advantage of his rights on cross-examination and placed his version of events before the jury.[2]

---

[2] Perry was anything but a passive witness on cross-examination. He was able to resist attempts by the prosecution to color his story, and he was able to tell his own version of events. For example, he was asked about his familiarity with the victim's apartment:

> Q. All right. So you don't remember then going out to this apartment complex, do you?
>
> A. I don't even know where these complexes is as I have stated.
>
> Q. Well, that's where Mrs. Heimberger lived. That's where she was living on March the 5th. Do you remember going out there in your car and locking up your car somewhere in this area?

[2] (Cont.) A. How many times I got to tell you? I don't know where this complex is. I don't know where the complex is.

> . . .
>
> Q. Do you remember, sir, going out there and getting in the car with Mrs. Heimberger? Do you remember that?
>
> A. I refuse to answer that. I have already stated that I have not -- I have no knowledge of where these complexes is if that's the only question you have to ask me.

He corrected the prosecution when questioned about his gun:

> Q. You put [the gun] in your car in your possession, right?
>
> A. At what time are you talking about? When?
>
> Q. Well, sir, when you took it in and cleaned it the first time before you went over to Bumpsie's, you intentionally put it in your vehicle, didn't you?
>
> A. No, I didn't.
>
> Q. You did not put it in your vehicle?
>
> A. No, I didn't.
>
> Q. I thought I heard you say you put it under the floorboard, the floormat?
>
> A. I did under the floormat of my mother-in-law's car.

He told his own version of events when questioned about his fingerprint:

> Q. Can you tell me, sir, how your fingerprint got on Mrs. Heimberger's automobile?
>
> . . .
>
> A. Oh, well, as I was searching her vehicle.
>
> . . .
>
> Q. How did you come to get in the particular location that it was found if you were searching her vehicle?
>
> A. What you mean in the particular location?
>
> Q. You were on the inside searching the car, weren't you?

The evidence against Perry was overwhelming. Tire tracks from Perry's car were found at the murder scene, as were Perry's footprints. His fingerprint was found on the victim's car. Perry admitted, at one point, to shooting the victim, but claimed the shooting had been an accident. He later admitted to having sexual relations with the victim against her will on the night of her murder, but claimed that he did so under duress.

The vigor of Perry's representation throughout by a team of two able attorneys, the length of the trial and the utter brevity of the bar order, the presence of consultative recesses shortly before Perry's testimony, and the absence of any other colorable assignment of error to any other aspect of these prolonged proceedings persuade us that the possibility of

[2] (Cont.) A.I was sitting in the front seat with my left foot in it.

Q. Sitting in the front seat. Well, were you aware that the fingerprint was taken on the outside of the window and not on the inside?

A. Yes, I am aware of that.

Q. So you must have put it on there before you got in, is that what you're saying?

A. No, my fingerprints could have been put on the window after I grabbed on to the window and the door when Duke-Dog was driving off.

Perry also took advantage of his right to explain his answers on cross-examination. For example, when shown his time card, which indicated that he had gone to work the day after the murder, he testified as follows:

Q. That's your time card where you went to work that day, wasn't it?

A. It has on here Friday P.M. 12:09 but it also had in handwriting 3-6-81 that anybody could put down.

prejudice is utterly remote. While a disputed question of material fact as to prejudice would require a remand, we are unpersuaded that an evidentiary hearing is necessary on this record.[3]

VI.

The gravity of a criminal conviction requires that courts strive to make criminal proceedings as fair and flawless as possible. While the courts must do everything they can to protect the rights of accused persons, they must not lose sight of the inevitability of imperfection in our criminal justice system. It would be wrong to exalt technical perfection at the expense of our society's legitimate and weighty interest in punishing offenders. Where error in a criminal trial is not of the variety that threatens its reliability, rules of per se

[3] Chief Judge Winter's dissent contends that the application of a prejudice analysis in this case is likely to lead to interference with the attorney-client relationship. This case raises no such danger, however, because the clear absence of prejudice has obviated the need for any inquiry into that relationship. We therefore see no need to address this concern in this case, and we do not address it.

We note, however, that there may be cases which do raise this concern. Requiring a defendant to show prejudice in those cases might require him to reveal privileged confidences. See Redman v. Bailey, 657 F.2d 21, 24 (3d Cir. 1981), cert. denied, 454 U.S. 1153 (1982). The prejudice inquiry under Strickland and Cronic may pose a similar dilemma. In those cases the Supreme Court placed on the defendant the burden of showing that he had been prejudiced by the ineffective assistance of counsel, 466 U.S. 687; 466 U.S. 658. Strickland and Cronic did not, however, address the question of burden allocation where judicial error, rather than the shortcomings of defense counsel, is at issue. The absence of prejudice under any allocation makes it unnecessary for us to address that question here.

reversal are unwarranted. A defendant who suffers such an error must be given the opportunity to show that he has been prejudiced thereby, but he ought not to reap a windfall where he has not been injured.

Because Perry was not prejudiced by the trial court's restriction, the judgment of the district court is reversed and remanded with directions to dismiss this petition.

REVERSED AND REMANDED.

WINTER, Chief Judge, dissenting:

Few categories of constitutional error so undermine the adversary system as to warrant reversal without any proof of prejudice in a particular case. Denial of the assistance of counsel during a critical stage of criminal proceedings is one such category of error. Whether the deprivation of counsel spans an entire trial or but a fraction thereof, it renders suspect any result that is obtained.

The Supreme Court has long recognized the indispensable role in the adversary process that is played by legal counsel. The Court invokes a strong presumption that counsel perform competently in this role, and defers routinely to what are invariably characterized as an attorney's "strategic" decisions. As a necessary corollary to this principle, however, we must accept the consequences of preventing an attorney from performing that vital role. The majority here does not deny that the district court committed an error of constitutional magnitude. Rather than create arbitrary lines below which we pretend to some assurance that prejudice is unlikely, we must recognize the concomitant presumption that a denial of counsel -- for whatever length of time -- is a denial of constitutional right and that a conviction obtained where there has been such a denial cannot stand.

I.

In Geders v. United States, 425 U.S. 80 (1976), the Supreme Court overturned a conviction obtained after defendant was precluded from consulting with his attorney during a seventeen-hour

overnight recess between his direct and cross-examination. The Court held that defendant's Sixth Amendment right to counsel had been violated, and reversed and remanded the case without any inquiry into whether the violation had resulted in actual prejudice to defendant. The opinion noted, however, that the effect of a similar communication bar imposed during "a brief routine recess" in the trial was not before the Court. 425 U.S. at 89 n.2.

The issue reserved in Geders was first addressed by us in United States v. Allen, 542 F.2d 630 (4 Cir. 1976), cert. denied, 430 U.S. 908 (1977). We held in Allen that

> the Sixth Amendment right to counsel. . . . is so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason.

542 F.2d at 633. We deemed insufficient to justify even a brief encroachment on the right to counsel the fear that defense attorneys would engage in unethical coaching -- the only rationale offered in support of the trial court's action here. We also refused to credit the assumption that many attorneys would flout their ethical obligations. Moreover, we noted that improper coaching can be deterred by knowledge of the prosecution's ability to inquire about such coaching during cross-examination. The few attorneys whose scruples are more easily overcome will nonetheless achieve little in a few minutes time, and will focus instead on pretrial efforts which the court is, in any case, powerless to prevent. As Justice Marshall, joined by Justice Brennan, remarked in his concurrence in Geders,

> I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.

425 U.S. at 93. Accordingly, we concluded in Allen that "the Sixth Amendment right to counsel ought to prevail over the extremely limited value of circumscribing that right for perhaps 20 or 40 minutes during the course of a trial day." 542 F.2d at 633. We rejected the idea of conducting a case-by-case assessment of whether a defendant had been prejudiced by a given deprivation of counsel; "the administration of such a rule . . . would not be worth its cost." Id.

Six years later, in Stubbs v. Bordenkircher, 689 F.2d 1205, 1206 (4 Cir. 1982), cert. denied, 461 U.S. 907 (1983), we reaffirmed our holding in Allen:

> We think the district court properly concluded that any restriction upon a defendant's access to his counsel during a recess, whether the recess be extended or brief, is constitutionally impermissible; and, further, that a petitioner such as Stubbs is not required to demonstrate prejudice.

We added the requirement, however, that defendant prove that his right to counsel was actually denied i.e., "that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." Id. at 1207.[1]

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[1] The government argues that this latter requirement was not met in this case because there is no proof that Perry desired to consult with his attorney during the break-- only that his attorney wished to speak with Perry. This distinction is untenable. As Perry argues, it is the function of defense attorneys to speak

II.

The majority in this case holds that two recent Supreme Court decisions have undercut Allen and Stubbs.[2] I cannot agree.

In Strickland v. Washington, 466 U.S. 668 (1984) the Supreme Court established a two-part test for analyzing claims of ineffective assistance of counsel: a defendant must prove that the assistance was "deficient," and that he was so prejudiced thereby that the result of the trial is rendered unreliable. 466 U.S. at 687-90. In United States v. Cronic, 466 U.S. 648, 660-62, 666 (1984), the Court held that there are some limited circumstances in which ineffectiveness may be "properly presumed without inquiry into [counsel's] actual performance at trial," but that such was not the case there. Neither of these decisions dictates a different result in Allen or Stubbs; to the contrary, they support the analysis employed in those earlier cases.

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[1] (Cont.) on behalf of their clients in addressing the court. Indeed, an attorney's continual presence is constitutionally required precisely because the defendant will often be unable to gauge for himself when he is in need of legal assistance. See Strickland v. Washington, 466 U.S. 668, 685-89 (1984); Geders, 425 U.S. at 88-89. When examined in context, it is clear that the opinion in Stubbs would recognize an objection made by either the attorney or defendant himself. See 689 F.2d at 1207. See also Crutchfield v. Wainwright, 803 F.2d 1103, 1109 (11 Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 3235 (1987) ("If the record reflected such a desire [to consult] by either [defendant or his attorney], we would find that the trial judge's admonition [against such consultation] constituted reversible error"). Moreover, Geders itself involved an objection registered solely by the defendant's attorney.

[2] It is interesting to note that the government made no such suggestion in its brief.

Unlike Allen, Stubbs and the case at bar, both Strickland and Cronic involved defendants who had full access to their attorneys; the question in each of those Supreme Court decisions concerned the adequacy of the performance of the attorneys. Indeed, in both Strickland and Cronic, the Court was careful to distinguish cases in which a defendant's access to counsel was denied at some key point during the trial. Cronic, 466 U.S. at 659 n.25 ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. See, e.g., Geders v. United States, ..."); Strickland, 466 U.S. at 692. See also Green v. Arn, 809 F.2d 1257, 1262-63 (6 Cir. 1987) pet. for cert. filed (Apr. 24, 1987); Crutchfield v. Wainwright, 803 F.2d 1103, 1106-09 (11 Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 3235 (1987) ("Cronic and Strickland make clear that 'where actual or constructive denial of assistance of counsel occurs a per se rule of prejudice applies'" (citation omitted)); Siverson v. O'Leary, 764 F.2d 1208, 1216 (7 Cir. 1985) (Strickland and Cronic explicitly treat as separate and distinct cases involving the denial of counsel and cases involving ineffective assistance).

There are several justifications for this distinction. As the Supreme Court noted in Cronic, 466 U.S. at 658-59:

> There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. [footnotes omitted]

Accord Strickland 466 U.S. at 692; Crutchfield, 803 F.2d at 1108-09. If the denial occurs at a critical stage of the proceedings, its duration should make little difference. See Delaware v. Van Arsdall, 475 U.S. _____, 89 L. Ed. 2d 674, 685 (1986) ("some constitutional errors -- such as denying a defendant the assistance of counsel at trial . . . -- are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case"); Geders, 425 U.S. at 88-89, quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("[A criminal defendant] requires the guiding hand of counsel at every step in the proceedings against him"); Crutchfield, 803 F.2d at 1108 (any denial of counsel constitutes reversible error and requires a new trial); United States v. Bryant, 545 F.2d 1035, 1036 (6 Cir. 1976). Indeed, as Justice Marshall observed in his Geders concurrence, "the general principles adopted by the Court today are fully applicable to the analysis of any order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial." 425 U.S. at 92 (emphasis in original).

Our system of criminal justice is grounded on the premise that the adversarial process yields fair and reliable results. This process can achieve that result only when there are present reasonably effective advocates on each side. As the Supreme Court explained in Strickland, "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the

adversarial system to produce just results." 466 U.S. at 685. Because of the difficulties in second-guessing strategic decisions made in the heat of a trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689. Thus, once a defendant's fate is placed in the hands of an attorney, courts are loathe to impugn the resulting verdict as unfairly procured. However, that presumption of fairness is triggered only when the attorney is allowed to do his job. It follows that a defendant's ability to confer with his attorney at every critical stage is a prerequisite to invoking the presumption that the result is a just one. See Cronic, 466 U.S. at 659 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"). Accordingly, the heavy burden imposed on complaining defendants in ineffective assistance cases like Strickland and Cronic has no relevance in cases alleging a complete denial of such assistance at a critical juncture:

> The crucial premise on which the Strickland formula rests--that counsel was in fact assisting the accused during the proceedings and should be strongly presumed to have made tactical judgments "within the wide range of reasonable professional assistance," 104 S. Ct. at 2066--is totally inapplicable when counsel was absent from the proceedings and unavailable to make any tactical judgments whatsoever.

Siverson, 764 F.2d at 1216. The same presumption that requires a demonstration of prejudice in establishing claims of ineffective assistance simultaneously renders unnecessary such a requirement for claims of denial of assistance.

III.

One reason cited by the Strickland Court for endorsing a strong presumption of effective assistance is the concern that "intrusive post-trial inquiry into attorney performance or . . . detailed guidelines for its evaluation" risks interfering with the attorney-client relationship and deterring ardent and independent advocacy. See 466 U.S. at 690. It is precisely those risks, however, which are likely to result from application of Strickland's requirement of proof of prejudice in cases alleging denial of assistance. Bailey v. Redman, 657 F.2d 21, 24 (3 Cir. 1981), cert. denied, 454 U.S. 1153 (1982) (rejecting prejudice requirement for this reason). As the District of Columbia Circuit recently explained:

> The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that did take place, to see if defendant nevertheless received adequate assistance.
>
> We cannot accept a rule whereby private discussions between counsel and client could be exposed in order to let the government show that the accused's sixth amendment rights were not violated.

Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986) (emphasis in original).[3] The majority ostensibly avoids this

[3] Another justification for requiring the defendant to demonstrate prejudice is to ensure that there has actually been a Sixth Amendment violation, i.e., an impairment of "the reliability of the trial process." Cronic, 466 U.S. at 658. In this case, however, the requirement that a defendant prove an actual deprivation of counsel -- that there would have been consultation but for the court's order -- serves the same purpose. Had the attorney been permitted to consult with his client, we could have assumed that he would have performed competently so as

predicament by foregoing any assessment of prejudice in this case, and choosing instead to label harmless, as a matter of law, the fifteen-minute deprivation of counsel to which Perry was subjected. Such an approach, while expedient in this instance, provides neither a logical nor lasting solution to the problem.

As noted above, any denial of a defendant's access to counsel, no matter how long, is presumptively prejudicial if it occurs during a critical stage of the proceedings. The nonmonetary value of an attorney's assistance is not measured solely, or even primarily, in hours and minutes. It is not difficult to conceive of situations in which a ten or fifteen minute recess could be critical to the outcome of a trial. It may be that counsel during direct examination had a new thought as to a possible helpful inquiry which could be made on rebuttal if defendant's recollection of this information was not triggered until defendant appeared on the witness stand. See, e.g., Allen, 542 F.2d at 633. It may be that counsel during direct examination had a new thought as to a possible inquiry which could be made on rebuttal if defendant's proposed answer were only known. It may be that the prosecution elicited from defendant unanticipated and damaging testimony which defendant can effectively neutralize, but only if he can explain the situation to his attorney so that the latter can ask the appropriate questions during rebuttal. Even an attorney's soothing assurances to

[3] (Cont.) to trigger the presumption of a fair and reliable result. Conversely, once it is assumed that, but for the court's intervention, the attorney would have been performing his advisory function, it follows that the denial of his assistance was presumptively detrimental and casts doubt upon

a defendant, prior to cross-examination, along with reminders of the rules for such testimony, could have a marked effect on a defendant's performance and demeanor on the stand. Other examples can be posited, but the possible situations in which the assistance of counsel may be critical are too numerous for exhaustive treatment here. Their only common threads are the irrelevance of the duration of the deprivation of counsel or the fortuity of the circumstances giving rise to the deprivation.[4] Indeed, deprivation during an overnight recess, which the majority acknowledges to require automatic reversal, may entail an effective deprivation of little more than the fifteen minutes at stake here because many attorneys will devote the vast majority of such an extended break to preparation for the next day of trial, while sending the client home to sleep, or back to jail.

Even were I to concede that duration is determinative of prejudice, I would nonetheless find the majority's position insupportable. In the majority's view, there lies somewhere between the seventeen hours in Geders and the fifteen minutes in the instant case a period of time above which all deprivations of counsel are prejudicial per se, and below which they are invariably harmless. Divination of the dividing point between these critical periods is, to my mind, an impossible task. Such an endeavor will require either an arbitrary selection, unrelated

[3] (Cont.) the fairness and reliability of the trial itself.

[4] The majority opinion suggests that because Perry had no entitlement to a recess, the aid which his counsel may have given him during the fortuitous one which occurred is simply irrelevant. This, it seems to me, stands Sixth Amendment precedents on their head. It is not the fortuity of the

to the existence or probability of actual prejudice, or the very type of case-by-case inquiry which the per se approach wisely seeks to avoid. In either situation, it is the delicate and time-honored attorney-client relationship, and its pivotal role in our adversary system, that suffers.

Most circuits that have considered the issue have adopted a per se rule under which deprivations of counsel during critical stages of a trial are held to warrant reversal without a finding of prejudice. Crutchfield, 803 F.2d at 1109. See, e.g., Green, 809 F.2d at 1263 (6 Cir. 1987) (defendant need merely prove attorney's absence during critical stage -- harmless error analysis appropriate only in some instances, such as absence during preliminary hearing, jury deliberations and return of verdict); Crutchfield, 803 F.2d at 1109-10 (11 Cir. 1986) (per se rule applies once defendant proves consultation would have occurred absent court intervention), Bailey, 657 F.2d at 24 (3 Cir. 1981) (no demonstration of prejudice is necessary; defendant must only prove interference with his desire to meet with counsel); United States v. Vesaas, 586 F.2d 101, 102 n.2 (8 Cir. 1978) ("we have grave doubts that even a brief restriction on a criminal defendant's right to confer with counsel can be squared with the Sixth Amendment") (dicta).[5] The Second Circuit, while declining to grant an automatic reversal in the case before it at the

[4] (Cont.) opportunity that a defendant has to consult counsel that is important. It is the services that counsel could render.

[5] The Seventh Circuit does not require defendants to prove prejudice, as in Strickland, but does permit the government to prove that the error was harmless beyond a reasonable doubt. Siverson, 764 F.2d 1208, 1217 (7 Cir. 1985).

time, has suggested the possibility of prospective application of a per se rule. In United States v. Dilapi, 651 F.2d 140, 147-49 (2 Cir. 1981), cert. denied 455 U.S. 938 (1982), the court refused to require reversal where defendant's consultation with counsel was barred during a five-minute recess in the middle of defendant's cross-examination, finding "not even a remote risk of actual prejudice." This was, however, the first ruling in that circuit to deal with a brief recess in the aftermath of Geders. Accordingly, the court was careful to note:

> We need not determine whether a similar instruction would require reversal in cases arising hereafter without regard to actual prejudice. It is sufficient to state that the instruction should not again be given.

Id. at 149.

A per se rule of reversal for all deprivations of counsel would pose no grave threat to the administration of the criminal justice system. A prophylactic rule of the type advocated here would be extremely easy to follow. As the court in DiLapi apparently recognized, supra, once a rule is announced that proscribes any judicial interference with attorney-client consultations, there is no reason to believe that trial courts will deviate therefrom. In those rare cases where deviations are nonetheless contemplated, the advantages of a per se rule will still outweigh its costs. As the Supreme Court observed in Geders,

> There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of

> improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972).

425 U.S. at 91.

In sum, I do not believe that Strickland and Cronic necessitate reconsideration or modification of this circuit's precedents, nor do I believe that any modification is desirable. Any deprivation of the right to counsel, a right which lies at the foundation of our system of criminal justice, warrants reversal without proof of prejudice, and the Supreme Court has consistently so held. I see no justification for the exception created by the majority.

Accordingly, I respectfully dissent.

Judge Phillips, Judge Murnaghan, and Judge Sprouse authorize me to say that they join in this opinion.

MURNAGHAN, Circuit Judge, dissenting:

What Chief Judge Winter has written in dissent states eloquently and lucidly why the majority, to my mind, has lapsed into imprecise thinking and disregard of the American Constitution's Sixth Amendment guarantee to the rights to counsel for those accused of crime. I write in dissent only to state additional reasons why that is so.

The majority seems to agree that United States v. Allen, 542 F.2d 630 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982), cert. denied, 461 U.S. 907 (1983), both of which indicate there is constitutional error here mandating a new trial, "continue to govern" (majority Slip Op. at 4), except to the extent, if any, the Supreme Court decisions in United States v. Cronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984) may implicitly compel an opposite result. The difference between the two situations is, however, not insubstantial, namely, (a) one is where counsel is fully and effectively denied for part of the trial and (b) the other is where counsel is constantly available to the defendant but acts for part of the time in an ineffective manner. It is logically impossible to argue that no counsel is effective counsel. There is simply no counsel effective or ineffective. It is another thing to contend that counsel who was on the scene all the time and available to the defendant was not ineffective or that his ineffectiveness did not occasion prejudice.

The difference stems from the fact that absolute denial of counsel runs up explicitly against the Sixth Amendment guarantee of the right "to have the Assistance of Counsel" while ineffective assistance of counsel is not specifically proscribed. Its less favored status derives in part from the impact of the due process provisions of the Fifth Amendment guaranteeing a fair trial, and "due process" which is inevitably a more flexible, less specific doctrine. See Strickland, 466 U.S. at 685. Denial of counsel is a "pure" Sixth Amendment violation.[1] Ineffective assistance is, under Strickland, a Sixth Amendment violation, but a violation derived by reference to and under interpretative pressure of the Fifth Amendment.

[1] The majority attempts to minimize the importance of the distinction, citing cases which have held that where there is a conflict between the unfettered assistance of counsel, on the one hand, and the need for the orderly and efficient procession of the case, on the other, the right to assistance of counsel must give way. The majority relies on Morris v. Slappy, 461 U.S. 1, 11 (1983), where it was said:

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. . . . Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.

See also Geders v. United States, 425 U.S. 80, 91, 92 (1976); United States v. Vasquez, 732 F.2d 846 (11th Cir. 1984); Pope v. State, 440 A.2d 719 (R.I. 1982). However, those cases all focus on avoidance of interruption of a trial to permit the defendant's consultation with counsel. Here the interruption (recess) had already occurred for completely different and independent reasons and lasted for 15 minutes or so. The conference between counsel and client which was sought would

The reason for that difference, and the difference in result depending on which is applicable, are not difficult to ascertain. Where there is absolute denial of counsel, the error which exists (the majority accepts that the complete barring of counsel during a court recess was error, Slip Op. at 4) is an error attributable to the trial judge. When ineffective assistance is concerned, the judge is not involved in the mistake, the error being that of counsel. Counsel's decisions often are not effectively subject to criticism because of the wide-ranging consideration that he or she must be allowed to make "strategic" decisions. In any event, unlike the situation where there is outright denial of counsel, the judge remains completely unbiased and impartial in the case of ineffective assistance.

In the case of outright denial of counsel, however, he or she who must address the issue before it reaches us has every reason, however subconscious it may be, to find grounds for ruling "no prejudice" in order to sustain his or her action and to avoid the need for a new trial.[2] His or her decision inevitably serves to shape the question as it reaches us on appeal. Such shaping, perhaps biased in a case of total denial

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[1] (Cont.) not have led in any way to a delay or other disruption of the trial.

[2] If the judge, unmotivated consciously or unconsciously by such considerations, would have granted a new trial, we, as appellate judges, would not even confront the issue. Yet the subconscious desire to be thought right is a powerful and common force, and might quite possibly lead to a denial of a new trial when one should have been granted.

such as we have here, is not so biased in the case of counsel always available to defendant but charged with prejudicial ineffective assistance.

It is unlikely that judges would consciously tailor their findings in order to save themselves from being reversed on appeal. We may assume that judges, despite some unjustified generalized suspicions to the contrary, are honorable men and women and would not take a step consciously in derogation of the defendant's rights in order to spare themselves reversal on appeal.

However, a person, on becoming a judge, does not become devoid of human reactions and motivations and the possibility of subconscious motivation cannot be discounted or ignored. It is a bad rule of law which subjects a judge to the temptation. That is perhaps why the rule that denial of counsel for any length of time whenever it could be significant to the defense will result in a new trial. Here the deprivation of any counsel "could" be prejudicial, and requiring greater proof would, for reasons convincingly alluded to by Chief Judge Winter, be improper as forcing abrogation of the attorney-client privilege.

It is, indeed, surprising that the majority, in light of noisy criticism of the courts for not adhering strictly to the language of the Framers, should proceed so blithely, and on examination with little authority, to ignore the guarantee of assistance of counsel spelled out in the Sixth Amendment.

There is simply no satisfactory way to insure that complete denial of counsel was not prejudicial when access to counsel was absolutely forbidden during trial, even if the time involved was but 15 minutes. The Sixth Amendment guarantees "the right to the effective assistance of counsel." Strickland, 466 U.S. at 686 (emphasis supplied). Deprivations of counsel render assistance ineffective, for assistance simply does not exist, and therefore violation of the Sixth Amendment is clear.

To approach the question on a "strict construction" basis, we would have first to recognize that the applicable constitutional language is the Sixth Amendment guarantee of "assistance of counsel." The next thing to recognize is agreed to by the majority, namely, that there was an error in the denial of that guarantee. The person here involved for the crucial 15 minutes had no assistance of counsel. That should be the end of things, unless one wishes to depart from strict construction by adding that the Supreme Court has gone beyond the language of the Framers in the Sixth Amendment by expanding it to read: "effective assistance of counsel at a crucial point in the proceeding." There can be no doubt that in this case a crucial point in the proceeding was involved. The defendant had just completed his direct examination and was going into cross-examination in a case where he was on trial for his life, the state having sought the death penalty.

Consequently, we have to concentrate at most on the implication of the word "effective." The right guaranteed by

the Sixth Amendment is the right to the effective assistance of counsel. Strickland, 466 U.S. at 686 (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).[3]

It seems inescapable that a slight imprecision would not affect the outcome in the matter before the court, but when the court refers in its opinion to some other case, there might be some trivial inexactness in use of words. The question in McMann was whether counsel had incompetently advised criminal defendants. Effective assistance of counsel might be construed, as a linguistic matter, to mean only help that led to a verdict or other finding of not guilty, that being the only truly effective assistance which a defendant is likely to desire. With a little more precision the Supreme Court would have said, making use of the usually scorned double negative, "the right to the not ineffective assistance of counsel."

Once we have come so far we understand the rationale behind Strickland and Cronic. In those cases, assistance of counsel was always provided. If counsel did something that was below professional standards, it was not ineffective simply because even the skill of Clarence Darrow would not have led to a different result. Counsel's error would have been totally harmless. In the case which concerns us here, however, there was not any assistance of counsel, so whether it was effective

[3] For our purposes, it is not significant if the addition of the word "effective" marked a departure from "strict construction." The Supreme Court has spoken and we must listen.

or ineffective is not a question which arises or can arise. The total denial of assistance of counsel violates the Constitution and that should be the end of the matter.

On the majority's approach, if the defendant was absolutely denied counsel and represented himself, according to later expert testimony, not in accordance with the cliche, as a fool, but apparently as well as any seasoned counsel could have, the defendant could not complain, for the denial would be, according to the approach of the majority, lacking in prejudice. There is an old saying: cessante ratione cessat ipsa lex. In this case, not only do reasons cease, but reason itself is absent.

Judge Phillips and Judge Sprouse authorize me to say that they join in this opinion.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

No. 87-6325

November Term, 1987

Donald Ray Perry, Petitioner,

versus

William Leeke, Commissioner, South Carolina Department of Corrections, and the Attorney General of the State of South Carolina, Respondents.

On Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY DENIED THE PETITION FOR A WRIT OF HABEAS CORPUS WHERE THE RECORD REVEALS THAT THERE WAS NO PREJUDICE FROM ONE BRIEF SEQUESTRATION OF THE PETITIONER FROM HIS COUNSEL DURING A LENGTHY TRIAL BETWEEN HIS DIRECT AND CROSS-EXAMINATION?

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The Respondents, above named, hereby make a Brief in Opposition to the Petition for a Writ of Certiorari and request that the Petition be denied.

CITATION TO OPINION BELOW

The opinions relevant to the case are Donald Ray Perry v. William D. Leeke, et al., 832 F.2d 837 (4th Cir. 1987) (en banc) set forth in the Appendix at C.1. The Order of the Honorable C. Weston Houck, United States District Judge, is unpublished and styled Perry v. Leeke, C/A No. 3:85-2992-2, filed June 26, 1986, and set forth in the Appendix at B.1. The relevant opinion of the South Carolina Supreme Court is reported at State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983), and set forth in the Appendix at A.1. Certiorari was previously denied in this Court. Donald Ray Perry v. South Carolina, 461 U.S. 908 (82-6336) (April 25, 1983).

JURISDICTION

This matter comes before this Court pursuant to a Petition for a Writ of Habeas Corpus challenging a state court criminal conviction pursuant to 28 U.S.C. § 2254. On November 5, 1987, the United States Court of Appeals for the Fourth Circuit entered its judgment denying the request for relief. The Petitioner involves the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution. The statutory provisions involved are 28 U.S.C. § 2254.

STATEMENT OF THE CASE

A. Statement of the Proceedings.

This matter arises from the Petition for Certiorari by Petitioner Donald Ray Perry from the en banc decision of the Fourth Circuit holding that he was not prejudiced by the sequestration and directing that the Petition for a Writ of Habeas Corpus be dismissed. The Petitioner, Donald Ray Perry, is presently serving a sentence of life imprisonment for murder and kidnapping and thirty years for criminal sexual conduct in the first degree.

On March 5, 1981, Dr. Mary Heimberger had dinner with two friends at a restaurant in Richland County, South Carolina. After having dinner, she left alone in her own automobile. (Tr. pp. 3-6). Dr. Heimberger's associates became alarmed the next day when she failed to report for work. (Tr. pp. 11-21, 31-36). Police officers were notified and began a preliminary investigation of her disappearance. (Tr. pp. 108-111).

Two young boys subsequently found the body of Dr. Heimberger in a wooded area and notified the authorities. (Tr. pp. 157-158, 162, 164). Upon examination of the victim's body, it was found that she had been sexually assaulted, shot to death, and subjected to post-mortem abuse. (Tr. pp. 123-144).

The habeas Petitioner, Donald Ray Perry, was indicted during the August, 1981, term of the Court of General Sessions for Richland County for the offenses of murder, kidnapping, and criminal sexual conduct in the first degree. (Tr. pp. iii-viii). The Solicitor of the Fifth Judicial Circuit, the Honorable James C. Anders, gave timely notice to the petitioner of his intention to seek the death penalty in accordance with South Carolina law. Further, W. Gaston Fairey (present counsel before this Court), and Edward Mullineaux were appointed by the trial court to represent Mr. Perry in his trial.

On September 21, 1981, the trial commenced in Richland County before the Honorable Julius H. Baggett, Circuit Judge of South Carolina. Eight (8) days later, a short recess was held during the Petitioner's testimony that is the primary subject to his appeal. (A. p. 142). On October 2, 1981, the jury found the Petitioner guilty of murder, kidnapping, and criminal sexual conduct.

Pursuant to the South Carolina Death Penalty Act, a bifurcated sentencing proceeding was held. After further testimony was introduced by the defense (Tr. pp. 1196-1212), the jury recommended a sentence of life imprisonment for murder rather than the death penalty. On October 5, 1981, Judge Baggett sentenced the Petitioner to life imprisonment for murder, life imprisonment consecutive for kidnapping, and thirty (30) years consecutive for criminal sexual conduct in the first degree.

The Petitioner timely filed a notice of intention to appeal on October 12, 1981. The Petitioner was represented in the appeal by David W. Carpenter of the South Carolina Commission on Appellate Defense, as well as his trial counsel. Among others, the Petitioner raised the following as an exception:

> I. The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

(Tr. p. 1346). The Petitioner raised this issue in his brief to the South Carolina Supreme Court. (Brief of Appellant, pp. 1-6). On January 3, 1983, the South Carolina Supreme Court issued its opinion, written by Associate Justice Littlejohn, upholding the conviction rejecting the argument of the Petitioner. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983). (A. pp. 29-33). The Petitioner made a petition for certiorari to the United States Supreme Court on this issue. On April 25, 1983, the Court issued its order denying the petition for certiorari. Donald Ray Perry v. South Carolina, No. 82-6336, 461 U.S. 908, 103 S.Ct. 1881, 76 L.Ed.2d 811 (1983).

On November 11, 1985, the Petitioner, with the assistance of present counsel, made a petition for writ of habeas corpus contending that he was denied the effective assistance of counsel between the Petitioner's direct and cross-examination at trial when the Court ordered that he was not to confer with counsel during a fifteen-minute break in the court proceedings. (A. p. 5). The Respondents made their return and a motion for summary judgment on December 20, 1985. (A. p. 8). On May 29, 1986, the Honorable Robert S. Carr issued his report and recommendation that the writ

[of habeas corpus] issue unless the State [of South Carolina] elects to retry the Petitioner within a reasonable period of time." (A. p. 21). In his report, Magistrate Carr opined that he was bound by this Court's decision in U.S. v. Allen, 542 F.2d 630 (4th Cir. 1976), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982). The Respondents made written objections to various factual findings of the report. (A. p. 22). On June 26, 1986, the Honorable C. Weston Houck issued his order rejecting the objections of the Respondents and conditionally ordering that the writ of habeas corpus shall issue. (A. p. 25). (App. p. B.1.).

On November 5, 1987, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the case with directions that the Petition be dismissed. In its decision, authored by Judge Wilkinson, the Court held that Perry was not entitled to the requested relief because, under the unique facts of the case, prejudice was not shown under the standard enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). In particular, it held that there was no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross-examination. (App. p. C.15). Further, the Court stated that "there is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior to his taking the witness stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course necessary." (App. p. C.15). The Court also noted the

testimony against Perry as being overwhelming and the representation of his counsel team as being vigorous. (App. p. C.17). It concluded that these factors persuaded the Court "that the possibility of prejudice is utterly remote." (App. p. C.18). Therein, it concluded that his request for relief was without merit.

B. Statement of the Facts.

The critical issue in this case concerns whether a brief recess between the direct and cross-examination during which counsel was denied access to his client entitles him to a new trial. The record before this Court reveals that the trial began with motions and jury selection on September 21, 1981, and concluded on October 5, 1981. During this lengthy trial, the record reveals that there were eleven recesses during the testimony portion of the trial prior to the Petitioner's testimony on September 29, 1981. (Tr. pp. 86, 176, 213, 274, 344, 352, 421, 470, 517, 585, 663). Included in these recesses were an overnight recess from September 25-26, 1981 (Tr. p. 176), a weekend recess from September 26-28, 1981 (Tr. p. 352), and an overnight recess from September 28-29, 1981 (Tr. p. 585). Of critical importance, there was a luncheon recess just prior to the Petitioner's testimony on September 29, 1981. It is uncontested that there was no restriction on counsel's access to his client during this entire period.

On September 29, 1981, the Petitioner was called to testify. (A. pp. 34-191). He was the third witness called by the defense. His testimony began immediately after a luncheon recess where his access to counsel was unrestricted. (A. p. 34). During his direct testimony, a recess was held at the request of a juror. (A. p. 76). It is uncontested that counsel had access to his client during this recess.

After counsel completed his direct examination of the Petitioner, a recess was ordered for fifteen minutes. (A. p. 142). After the recess was concluded, trial counsel made the following motion to the Court:

> Mr. Fairey: Your Honor, we have an additional motion for a mistrial on the grounds that we are being denied -- Mr. Perry is being denied adequate representation of counsel because I understand the Court has ordered the attorneys not to speak with him during this break.
>
> The Court: During the last break, that is true. Mr. Perry has testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied.
>
> Mr. Fairey: I would like the record to also reflect that such instructions have not been made for any other witness in this trial.
>
> The Court: That is correct. I'm not sure that situation has arisen up to this point in time.
>
> Mr. Fairey: I would also --
>
> The Court: And which it would not matter because no one is on trial but Mr. Perry and that motion would not apply. The Sixth Amendment rights apply only to one who is on trial.
>
> Mr. Fairey: I agree with you. But I would like the record to reflect that this is the only instance during the trial that this has been done and in several cases there have been breaks between direct and cross-examination.
>
> The Court: I'm not sure. I recall one other instance but I can't say exactly what it was. But your motion is noted, sir, and it is denied.

(A. p. 144). The Petitioner completed his testimony that afternoon. (A. p. 190)

Immediately after his testimony, an overnight recess was held during which time the Petitioner had access to counsel. (A. pp. 190-191). The record reflects that the defense further presented seventeen (17) additional witnesses during the guilt phase portion of his trial. (Tr. pp. 820-1135). During the presentation of these witnesses,

the following recesses occurred in which counsel's access to his client was not restricted: the overnight recess at the conclusion of Mr. Perry's examination (A. p. 190), a fifteen-minute recess on September 30, 1981, at the conclusion of Miriam Perry's direct testimony (A. p. 192), a lunch recess at the conclusion of Miriam Perry's testimony (A. p. 194), a brief recess at the conclusion of John Shupper's testimony (A. p. 195), an overnight recess at the conclusion of Dr. Follingstad's testimony to October 1, 1981 (A. p. 196), a brief recess for fifteen minutes at the conclusion of Dr. Morgan's testimony on October 31, 1981, at the request of counsel Fairey (A. p. 197). On October 1, 1981, the defense rested its case. (Tr. p. 1135).

During the reply testimony, there was also a brief recess waiting for a witness (Tr. p. 1158), and a lunch recess (A. p. 199). On October 1, 1981, the testimony was completed and the defense made its motions. (Tr. p. 1182). At the conclusion of these motions, there was an evening recess until the morning of October 2, 1981. (A. p. 201). After the arguments, charges, and deliberations had begun, an evening recess was held until October 3, 1981 (Tr. p. 1336).

On Saturday, October 3, 1981, the jury returned its verdict at 3:12 P.M. The jury convicted the Petitioner of murder, kidnapping. and criminal sexual conduct. (Tr. p. 1337). The jury was polled and advised that the penalty phase would begin Monday, October 5, 1981. (A. p. 202). Counsel for the Petitioner moved for a judgment n.o.v., or new trial, "based upon our lack of being able to have access to the defendant during the break taken during the Court proceedings." (A. p. 204). Pertinent inquiry was as follows:

The Court: I don't think it's necessary. I will state for the record as a stipulated matter if you care to that Mr. Mullineaux did attempt to talk to the defendant during the break and he was not allowed to because of the order that I issued.

Mr. Fairey: I would also like to put on the record that we were not notified as to the order prior to the order being issued. We didn't learn of that until we attempted to talk to the defendant.

The Court: True.

Mr. Fairey: We'd also like the Court to acknowledge that we would not have tried to do anything improper with the defendant.

The Court: I'm quick to acknowledge that. No question about that.

Mr. Fairey: Yes, sir, and other than answer his questions and also to make sure he understood his rights on cross-examination.

The Court: I'm sure you gentlemen realize why I did it. Well, I don't mean for you to acknowledge it. I've already stated why I did it so you have that on the record. That's all right.

(A. p. 204). The penalty phase testimony was begun on October 5, 1981. The Petitioner presented six (6) witnesses in mitigation of punishment. Counsel further pointed out to the Court eighteen (18) witnesses who had agreed to come to court and would have presented similar mitigation evidence. (Tr. p. 1213). After jury charges, the jury issued its recommendation of life imprisonment for murder. The trial court then sentenced the Petitioner to thirty (30) years imprisonment for criminal sexual conduct, life for kidnapping, and life for murder, consecutive to each other. The sentence for kidnapping was vacated on state law grounds on appeal, while the conviction was affirmed.

REASONS FOR DENYING THE WRIT

Respondents submit that the decision of the United States Court of Appeals, en banc, is entirely consistent with this Court's prior precedents in Geders v. U.S., 425 U.S. 80 (1976); Strickland v. Washington, 466 U.S. 668

(1984), and U.S. v. Cronic, 466 U.S. 648 (1984). The Petitioner relies upon Geders for support of his position. In Geders, however, the Court expressly reserved the question of whether a defendant's rights would be violated by an order preventing consultation "during a brief routine recess during the trial day." Geders v. U.S., 425 U.S. at 89 n. 2.

The Petitioner relies upon the position that other circuits have taken a different position than the Fourth Circuit to the applicability of the Strickland prejudice standard on similar cases. We submit that the cases cited by the Petitioner are distinguishable on the facts from this case. In U.S. v. Bryant, 545 F.2d 1035 (6th Cir. 1976), the Court applied the per se rule of Geders to a one hour lunch recess during which consultation is anticipated rather than the unexpected short break involved in this case. In Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986) (en banc), the Court also involved a break in the examination that may have extended to a two-hour lunch break and determined that there was no deprivation of a fair trial in the embargo order since the record did not reflect a desire by the defendant to consult nor an objection by counsel (a particularized showing of prejudice). In Mudd v. U.S., 798 F.2d 1509 (D.C. Cir. 1986), the Court was faced with an issue concerning a weekend recess from Friday to monday that was similar to the overnight recess in Geders. Similar, the Eighth Circuit decision in U.S. v. Vesaas, 586 F.2d 101, 102, n. 2 (8th Cir. 1978), only addressed in dicta a recess of unknown duration in a case which was dismissed for insufficiency of the evidence. Consistent with the decision of the Fourth Circuit is U.S. v. Dilapi, 651 F.2d 140 (2nd Cir. 1981), in which the Court refused to reverse

where a defendant was barred from consulting with his counsel during a five-minute recess in the midst of his cross-examination after finding that there was "not even a remote risk of actual prejudice." Dilapi was relied upon by the South Carolina Supreme Court in the instant case.

In this case, the South Carolina trial judge ordered that a recess be held for fifteen (15) minutes between the Petitioner's direct and cross-examination. (A. p. 144). During the recess, counsel were denied access to the Petitioner because the trial court ordered that counsel could not speak with the Petitioner during the short break because "he was not entitled to be cured or assisted or helped approaching his cross-examination." (A. p. 144). Trial counsel objected after the recess and moved for a mistrial on the ground that he was "being denied adequate representation of counsel." (A. p. 144). After the verdict was rendered, counsel, in his motion for a new trial, stated that co-counsel had attempted to talk to defendant during the break and that was the first they heard about the order. Counsel stated that their reason for the contact during the break was not to "have tried to do anything improper with the defendant ... other than answer his questions and also to make sure he understood his rights on cross-examination." (A. p. 204). The trial court and the South Carolina Supreme Court rejected the assertions of Petitioner's counsel. (A. pp. 204, 29-33). Because the circumstances surrounding the issuance of the order conclusively demonstrate that no harmful error took place, we submit that the Circuit Court's analysis was constitutionally correct.

In Geders v. U.S., supra, the United States Supreme Court held impermissible a sequestration order which prevented a criminal defendant from communicating with

counsel during a seventeen (17) hour overnight recess. It held that a trial judge's broad power to control the progress and shape of a trial did not include the power to prohibit consultation between a criminal defendant and his attorney for so long a period. It reached this result without requiring the defendant to make a preliminary showing of prejudice as a result of that order. Geders, therefore, holds that a sequestration order permitting an overnight hiatus in communication between a lawyer and his client is impermissible per se, and requires automatic reversal. The Court, however, expressly limited its holding to restrictions on attorney-client communication of overnight duration, as opposed to those of significantly shorter duration, such as brief routine recesses in the trial day. Geders, 425 U.S. 89 n. 2.

Subsequent to Geders, this Court in Strickland and Cronic held that ineffective assistance of counsel at trial does not require reversal of a conviction unless the deficient performance of counsel was sufficiently prejudicial. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As the Fourth Circuit held, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696. Clearly, the label as to whether it is a denial of counsel versus ineffective assistance of counsel should not be the determinative factor.

Strickland and Cronic held that because the purpose of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," id. at 689, the

analysis of claims alleging violations of the right to counsel always focuses on prejudice. Automatic reversal is warranted only where prejudice can be presumed:

> [T]he right to the effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated .... There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Cronic, 466 U.S. at 658. See also Strickland, 466 U.S. at 692.

In Cronic and Strickland, the petitioners contended that they had been deprived of their Sixth Amendment rights because they had been represented by allegedly incompetent or inadequate counsel. Such a deprivation is far more likely to have a prejudicial effect than the deprivation at issue here. Perry had very competent attorneys with whom he was able to confer during an overnight recess the night before and during a luncheon recess immediately prior to his testimony. It would make little sense to maintain a per se rule of reversal for a brief restriction on consultation, but to inquire into prejudice if Perry had been represented incompetently throughout. The existence of prejudice from a restriction such as this one is necessarily tied to the surrounding facts; it cannot be and will not be presumed to have so infected the entire trial that no course other than reversal of this conviction is conceivable.

The quality of Perry's representation belies the need for a rule to automatic reversal suggested in the Petition. He was represented by two attorneys, Mr. Fairey and Mr. Mullineaux, who were present and active throughout

the case. The defense presented some twenty-seven witnesses in Perry's behalf. Cross-examination of government witnesses was vigorous throughout. In all different stages of the trial -- from jury selection through closing argument, from the guilt phase through the sentencing phase -- this defendant was well served and ably represented. The trial judge commended Perry's counsel on the record for their competency and zeal, adding that he hoped "that all my lawyers would be equally prepared and dedicated to their cases." It would be far too simplistic to equate this case with those cases where judgment was rendered on an uncounselled defendant and to lump them all together under a "right to counsel" rubric which requires automatic reversal. The law must be sensitive to matters of degree, here the fact that for all but the tiniest fraction of trial time defendant consulted with counsel and was championed by counsel in the best traditions of adversary justice.

Because the state trial proceedings met the requirements of Geders, the Fourth Circuit holding is consistent with that decision. This was a lengthy trial, and there were eleven different recesses prior to Perry's testimony, including two overnight recesses, one weekend recess, and significantly, a luncheon recess immediately before Perry took the stand. At each of these recesses, there was no restriction on Perry's access to his counsel. During Perry's direct examination, a recess was also held at the request of a juror; Perry was not barred from access to counsel at that time either. After Perry's testimony, there were recesses of varying durations -- fifteen minute recesses, luncheon recesses, and overnight recesses -- during all of which Perry and his counsel were able to consult. Thus, the bar order at issue here applied to but one of many recesses, and a brief one at that.

The restriction at issue in Geders posed so great a danger to a fair trial that prejudice could be presumed. Its duration was extreme (a seventeen-hour overnight recess) and it occurred at a time when defendant and his counsel could have expected to confer. In contrast, the restriction here was not only brief, but occurred during an unscheduled recess during trial. Perry and his counsel had no entitlement to a recess at this time and had no reason to expect a recess to occur by chance between direct and cross-examination. In a majority of instances, cross-examination of a witness follows direct examination without a break. See Geders, 425 U.S. at 90. Because Perry had no entitlement to this recess, the dissenters' speculation on what valuable services counsel may have rendered is simply misdirected. New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult. To reverse automatically a conviction because of an absence of consultation during one brief, fortuitous recess in a trial which spanned nearly two weeks would be to confer a benefit upon a per se approach is thus apparent. The proper inquiry is whether this trial was unfair, whether this defendant suffered prejudice, whether this conviction was infirm -- in short, whether justice was done in this case.

In summary, we submit that the decision of the Fourth Circuit rested upon sound analysis of the decisions of this Court. The decision reviewed the conviction under a "fundamental fairness" analysis that was appropriate in its review as a habeas corpus court. The per se rule of automatic reversal pressed by the Petitioner is clearly inappropriate in this case where the totality of the

circumstance reflects an "utterly remote" risk of prejudice. His request must be denied.

CONCLUSION

For the reasons set forth herein, we request that the Petition be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

JAMES C. ANDERS
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

March 2, 1988
Columbia, South Carolina

IN THE
SUPREME COURT OF THE UNITED STATES

No. 87-6325

November Term, 1987

Donald Ray Perry, Petitioner,

versus

William Leeke, Commissioner, South Carolina Department of Corrections, and the Attorney General of the State of South Carolina, Respondents.

On Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and ten copies of Brief in Opposition to the Petition for Certiorari in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 2nd day of March, 1988.

Donald J. Zelenka

SWORN to before me this

2nd day of March, 1988.

Notary Public for South Carolina (LS)
My Commission Expires: 4/1/92.

No. 87-6325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DONALD RAY PERRY,
Petitioner,

v.

WILLIAM D. LEEKE, COMMISSIONER,
South Carolina Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 29, 1988
CERTIORARI GRANTED MARCH 28, 1988

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
March 6, 1981	Petitioner arrested and charged with Kidnapping, Criminal Sexual Conduct in the First Degree, and Murder of Mary Heimberger.
August 3, 1981	Petitioner indicted for Murder, Kidnapping, and Criminal Sexual Conduct in the First Degree.
September 21, 1981	Petitioner's trial commences in Richland County General Sessions Court.
September 29, 1981	Trial Court orders fifteen (15) minute recess and directs that Petitioner not be allowed to consult with anyone during recess.
October 3, 1981	Petitioner is convicted of Murder, Kidnapping and Criminal Sexual Conduct in the First Degree.
October 5, 1981	Trial Jury recommends life imprisonment and Petitioner is sentenced to life and thirty (30) years for Criminal Sexual Conduct in the First Degree.
January 3, 1983	Conviction affirmed by South Carolina Supreme Court, *State v. Perry*, 278 S.C. 490, 299 S.E. 2d 324 (1983).
April 25, 1983	Certiorari denied, *Perry v. South Carolina*, 461 U.S. 908 (1983).
November 1, 1985	Petition for Writ of Habeas Corpus filed in District Court of South Carolina.
June 26, 1986	District Court grants habeas relief.
July 14, 1986	Notice of Intent to Appeal filed by Attorney General of South Carolina.

DATE	PROCEEDINGS
November 5, 1987	Opinion *Perry v. Leeke* issued by Fourth Circuit Court of Appeals, *en banc*, 832 F.2d 837 (4th Cir. 1987).
January 29, 1988	Petition for Certiorari filed.
March 28, 1988	Petition for Certiorari and Motion for Leave to Proceed *In Forma Pauperis* granted by this Court.

RICHLAND COUNTY
COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DONALD RAY PERRY

EXCERPTS FROM TRIAL

September 21, 1981—October 2, 1981

• • • •

[Tr. 771]

THE COURT: Have you concluded?

MR. FAIREY: Yes, sir.

THE COURT: Thank you. Jury, please excuse me.

(Whereupon the jury leaves the jury box.)

THE COURT: Court will be in recess for fifteen minutes.

(Recess)

THE COURT: (At conclusion of recess) All right, sir.

MR. FAIREY: Your Honor, I want to make a motion for a mistrial because of the court's actions during the direct examination of Donald Ray Perry. I feel that as you are in direct view of the jury, the Court [772] exhibited impatience. The Court exhibited a loss of interest in the testimony that would be directly observable to the jury and thereby indirectly I'm sure would indicate to the jury some—I don't know what it would indicate to the jury but I hesitate to guess. In doing so I feel like it was an improper comment on the facts by

the Court and I'd also like to add that I had requested of the Court during one of the breaks that this concerned me and the Court has indicated that it would attempt not to show impatience. I understand direct examination was long and it was somewhat tedious but it was necessary we felt to present an accurate account.

THE COURT: Thank you, sir. I want you to know I take absolutely no offense at what you said. I have privately commended you for the job that you are doing in this trial. Anyone who is appointed to represent somebody who is an indigent in a capital murder case has my admiration and my respect. As to my facial comments upon the evidence, I do my best to control my emotions. I have been told that I have somewhat of an expressive face. I try to control that. I thought I had done a pretty fair job. I do not have the impression that I have influenced the jury in the slightest way. Their eyes have been riveted constantly upon the defendant and not upon me. Any impatience that I have manifested I think was minimal concerning the—compared to the patience which the Court granted out of the nature of this cause to this defendant which exceeds any degree of latitude which this Court has heretofore or will hereafter allow in the wandering and meanderings of the testimony of witnesses. I want the record to show that I have extended the utmost patience and leniency [773] in this regard because of the nature of this trial and for no other reason. Your motion is denied, sir.

MR. FAIREY: Your Honor, we have an additional motion for a mistrial on the grounds that we are being denied—Mr. Perry is being denied adequate representation of counsel because I understand the Court has ordered the attorneys not to speak with him during this break.

THE COURT: During the last break, that is true. Mr. Perry has testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross

examination. I felt in fairness to the state that was proper and I accept full responsibility for it. Your motion is denied.

MR. FAIREY: I would like the record to also reflect that such instructions have not been made for any other witness in this trial.

THE COURT: That is correct. I'm not sure that situation has arisen up to this point in time.

MR. FAIREY: I would also—

THE COURT: And which it would not matter because no one is on trial but Mr. Perry and that motion would not apply. The 6th amendment rights apply only to one who is on trial.

MR. FAIREY: I agree with you. But I would like the record to reflect that this is the only instance during the trial that this has been done and in several cases there have been breaks between direct and cross examination.

THE COURT: I'm not sure. I recall one other instance but I can't say exactly what it was. But your motion is noted, sir, and it is denied.

[774] MR. FAIREY: Proceeding subject to both motions.

THE COURT: Certainly. Bring the jury in, please.

(Whereupon the jury returns to the jury box.)

PROCEEDINGS AFTER VERDICT OF JURY

• • • •

[Tr. 960]

(Court returned October 5, 1981, at 9:30 A.M.)

THE COURT: All right, are there any motions from the defense?

MR. FAIREY: Yes, Your Honor. I assume this will be as if they were made when the verdict was rendered?

THE COURT: Oh, yes.

MR. FAIREY: We would move for a judgment n.o.v. or in the alternative for a new trial based on the following grounds. First will be the solicitor's closing argument. We feel it was highly improper and injected things into the case which were improper for the jury's consideration. It very possibly had a substantial effect on their eventual verdict in the case. Also, Your Honor, we would also move for a judgment n.o.v. or in the alternative for a new trial based upon the Court's comments during the trial of the case itself which I think we noted on the record at those times. We would also move for a new trial or judgent n.o.v. based on our lack of being able to have access to the defendant [961] during the break taken during the Court. We would also like to put up a proffer of proof.

THE COURT: I don't think it's necessary. I will state for the record as a stipulated matter if you care to that Mr. Mullineaux did attempt to talk to the defendant during the break and he was not allowed to because of the order that I issued.

MR. FAIREY: I would also like to put on the record that we were not notified as to the order prior to the order being issued. We didn't learn of that until we attempted to talk to the defendant.

THE COURT: True.

MR. FAIREY: We'd also like the Court to acknowledge that we would not have tried to do anything improper with the defendant.

THE COURT: I'm quick to acknowledge that. No question about that.

MR. FAIREY: Yes, sir, and other than answer his questions and also to make sure he understood his rights on cross examination.

THE COURT: I'm sure you gentlemen realize why I did it. Well, I don't mean for you to acknowledge it. I've already stated why I did it so you have that on the record. That's all right.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

Respondent,

v.

DONALD RAY PERRY,

Appellant.

Appeal From Richland County
Julius H. Baggett, Judge

OPINION NO. 21836

Filed January 3, 1983

AFFIRMED IN PART,
REVERSED IN PART.

LITTLEJOHN, A. J.: Appellant Donald Ray Perry was indicted and convicted of (1) murder, (2) kidnapping and (3) criminal sexual conduct in the first degree. The jury at the conclusion of the penalty phase of the bifurcated trial, recommended a sentence of life in prison for murder. The trial judge sentenced Appellant to consecutive sentences of confinement of (1) life for murder, (2) life for kidnapping, and (3) thirty years for criminal sexual conduct, first degree. Appellant appeals.

On the evening of March 5, 1981, Dr. Mary Heimberger had dinner with two friends at a restaurant in

Richland County. After having dinner, she left the restaurant alone in her own automobile. Her associates became alarmed the next day when she failed to report to work. Police officers were notified and began a preliminary investigation of her disappearance.

Two young boys subsequently found her dead body in a wooded area and notified the authorities. Upon examination of the victim's body, it was found that she had been sexually assaulted and shot to death. Appellant was arrested, charged and convicted of the murder, kidnapping and criminal sexual assault of the victim.

The first question of alleged trial error submits that:

> The trial court erred, in violation of the Sixth and Fourteenth Amendments to the U. S. Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

It is claimed that the rights of the Appellant, guaranteed by both the United States Constitution and the Constitution of South Carolina have been violated. The United States Constitution provides in relevant part in Article VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Constitution of South Carolina provides, in Article I, Section 14, that:

> Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.

We hold that these rights have not been violated.

The incident giving rise to the question happened as follows: at trial, the defense called numerous witnesses

including the Appellant himself. After the Appellant completed his direct testimony, the court announced, "court will be in recess for about fifteen minutes." The judge ordered that Appellant not speak to his attorney during the recess. Consultation not being permitted, counsel for the defense moved for a mistrial contending that the Appellant had been denied adequate representation of counsel because the court denied him the right to talk to his client between the direct examination and the cross examination—a period of about fifteen minutes.

The right of an accused person to be adequately represented by counsel is fundamental. Cases need not be cited for the proposition that the denial of right to counsel is of such constitutional magnitude as to command a new trial. The question we must answer in this case, framed differently from that stated by the Appellant, is whether the judge's denial of brief consultation after direct examination and before cross examination violated the Appellant's constitutional right to a fair trial so as to necessitate the case be tried again. Counsel for the Appellant relies largely upon the case of *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) to support his claim of reversible error. In that case, there was an overnight recess, a total of approximately seventeen hours, during which time the trial judge instructed counsel and client to refrain from conferring with each other. Mr. Chief Justice Burger, speaking for the Court, held the sequestration under these circumstances to be reversible error, saying:

> The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would *normally confer* with counsel. *We need not reach, and we do not deal with limitations imposed in other circumstances.* We hold that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment. (Emphasis added.)

We attach significance to the words "normally confer". Normally, counsel is not permitted to confer with his defendant client between direct examination and cross examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross examination begins, the judge would and should unhesitatingly deny the request. The fact that the court did not wish to declare a completely inflexible rule is emphasized by the second footnote. The Court preceded the footnote with this statement in the opinion:

> Other courts have concluded that an order preventing a defendant from consulting his attorney during an overnight recess infringes upon this substantial right.

The footnote then added:

> *United States v. Leighton*, 386 F.2d 822 (CA 2 1967), on which the Court of Appeals relied, involved an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day, a matter we emphasize is not before us in this case.

Our affirmance of the case is not inconsistent with *Geders*.

Nor, do we think that the other case upon which counsel largely relies for reversal justifies a new trial. That case is *United States v. Allen*, 542 F.2d 630 4th Cir. (1976) U.S., cert. denied, 430 U.S. 908. Therein, A. D. Allen, Jr., Ann Allen and Aubry Joe Allen were on trial for causing stolen merchandise to be transported in interstate commerce. All were convicted. During the trial, Ann Allen was denied the right to confer with counsel

overnight (same as *Geders*). A. D. Allen was denied the right to confer with counsel during a twenty-minute recess. The Fourth Circuit Court of Appeals reversed the conviction of Ann Allen. It affirmed the conviction of A. D. Allen. In so ruling, the Court said:

> We agree and hold that a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible, but apply the new rule prospectively only.

It is obvious that the Court followed *Geders* in reversing the conviction of Ann Allen. It is equally obvious that the Court used the case of A. D. Allen as a vehicle for declaring a new rule of court extending *Geders* and actually inconsistent with the intimations therein. The ruling will, we suppose, be binding on the trial judges in the Fourth Circuit until the Supreme Court of the United States decrees otherwise. The prospective ruling is not in any event binding on the Supreme Court of South Carolina. The United States Supreme Court was meticulous in *Geders* in refraining from declaring the rule which the Fourth Circuit Court of Appeals later promulgated prospectively. If we should follow the prospective ruling, which we refuse to do, we would merely hold that Appellant's conviction is affirmed and declare a rule prospectively. Prospective rulings are sometimes appropriate but should be promulgated sparingly. Certainly, this Court should not promulgate a rule even prospectively with which we are not in accord. Extensions of the rule substitute form for substance and disregard the basic proposition that Appellant in this case simply was not denied a fair trial. He was entitled to a fair trial but not a perfect one.

We are more in agreement with the reasoning of the Court in the case of *United States v. DiLapi*, 651 F.2d 140 (2d Cir. 1981), wherein the Second Circuit Court of Appeals held that even if a brief denial of the right to

confer with counsel existed, there was not even a remote risk of actual prejudice. Assuming without so holding that denial of right to confer with counsel for some given period of time might warrant a finding of prejudice per se, the constitutional guarantees do not require a presumption of prejudice under all circumstances whatsoever. Such is consistent with both *Geders* and the result, if not the prospective rule, in *Allen*.

Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences "a feel of the case" which oftentimes may not be detected from a cold printed record. When counsel for Appellant moved for a mistrial on the basis of the trial judge's directive, the trial judge gave a well-reasoned explanation for his actions:

> . . . Mr. Perry has testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and accept full responsibility for it. . . .

Next, Appellant challenges the admission in evidence of certain statements given by him to police officers. Appellant argues his constitutional rights to silence and self incrimination were violated by the police in obtaining these statements from him.

The trial judge made a finding that Appellant's statements were free and voluntary. The finding is abundantly supported by the record. Appellant never in any manner invoked his right to silence, which would have prevented further interrogation by the authorities. It is our conclusion that the statements admitted at the trial were not obtained in violation of Appellant's constitutional rights.

Appellant further argues that the Solicitor's closing argument was improper and constituted reversible error. We find that the State's closing argument is well within

the perimeters as set forth by the previous rulings of this Court. We find no error.

The Appellant argues, finally, that the trial court erred in sentencing him to life in prison for kidnapping. We agree and vacate only the kidnapping life imprisonment sentence. The *Code of Laws of South Carolina* (Cumm. Supp. 1981), § 16-3-910 defines kidnapping and provides the punishment as follows:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony and upon conviction, shall suffer the punishment of life imprisonment *unless sentenced for murder as provided in* § 16-3-20. (Emphasis added.)

Inasmuch as the Appellant has been sentenced to life imprisonment for murder (which we affirm), the Code section precludes a life imprisonment sentence for kidnapping. We so held in *State v. Copeland, et. al.*, filed November 10, 1982.

In summary, we vacate the life imprisonment sentence for kidnapping because of the statutory provision. The statute does not mandate a vacation of the kidnapping conviction. It merely provides that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment. The kidnapping conviction is, accordingly, affirmed. We affirm the conviction and sentence of the Appellant for murder and for criminal sexual assault first degree.

AFFIRMED IN PART.

REVERSED IN PART.

LEWIS, C.J., GREGORY and HARWELL, JJ., concur. NESS, A.J., dissents.

NESS, A.J. (dissenting): I disagree.

As the majority points out, the Supreme Court in *Geders*, supra, held that an order preventing a defendant from consulting with counsel during an overnight recess, when an accused would *normally confer* with counsel, is constitutionally impermissible. The majority properly attaches particular significance to the words "normally confer," but then misplaces the analogy.

The majority distinguishes the present case from *Geders* by observing that counsel is not normally permitted to confer with the defendant between direct and cross-examination. I fail to see the distinction, as the recess in *Geders* also occurred between direct and cross-examination. Rather, the *Geders* court recognized a defendant would normally confer with counsel during an overnight recess; likewise, a defendant would normally confer with counsel during a short routine recess.

I agree with the Fourth Circuit decision in State v. Allen, supra, which held the Sixth Amendment right to counsel is so fundamental that it should never be interferred with for any length of time absent some compelling reason. See also Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982). To allow defendants to be deprived of counsel during court-ordered recesses is to assume the worst of our system of criminal justice, i.e., that defense lawyers will urge their clients to lie under oath. I am unwilling to make so cynical an assumption, it being my belief that the vast majority of lawyers take seriously their ethical obligations as officers of the court.

Even if that assumption is to be made, the *Geders* opinion pointed out that opposing counsel and the trial judge are not without weapons to combat the unethical lawyer. The prosecutor is free to cross-examine concerning the extent of any "coaching," or the trial judge may direct the examination to continue without interruption until completed. Additionally, as noted in *Allen*, a lawyer

and client determined to lie will likely invent and polish the story long before trial; thus, the State benefits little from depriving a defendant of counsel during short recesses.

I think the Sixth Amendment right to counsel far outweighs the negligible value of restricting that right for a few minutes during trial. I would hold that a restriction on a defendant's right to consult with his attorney during even a brief routine recess is constitutionally impermissible and reverse.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:85-2992-2

DONALD RAY PERRY,
Petitioner,

vs.

WILLIAM D. LEEKE, Commissioner, South Carolina Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,
Respondents.

ORDER

This matter is before the court on the petition of state prisoner Donald Ray Perry for habeas corpus relief. The petition is before the court with the report and recommendation of the United States Magistrate, made in accordance with this court's order of reference and 28 U.S.C. § 636(b). The court is charged with making a *de novo* determination of any portions of the magistrate's recommendation to which specific objection is made; and it may accept, reject, or modify, in whole or in part, the recommendations made by the magistrate or recommit the matter to the magistrate with instructions.

In this case, the magistrate recommends that the writ issue unless the state elects to retry the petitioner within a reasonable period of time. The magistrate concluded that the petitioner was unconstitutionally denied right to counsel by the trial judge's order of sequestration during a brief trial recess. The respondents make four objections to the magistrate's report.

First, the respondents object to the magistrate's finding that the petitioner's trial counsel had no opportunity to object to the order of sequestration at the outset; respondents imply that counsel could have expressed an objection to the court during the recess. This objection is without merit. Counsel *may* have expressed an objection to the court during the recess, but the record reflects an objection was made on the record at the first opportunity following the trial judge's off-the-record, *sua sponte* issuance of the sequestration order. (Tr. at pp. 771-73, 960-61).

Similarly, respondents' second objection focuses on what is not in the record—whether the defendant requested the assistance of counsel during the recess. Of course, a contemporaneous record of such a request would not be made during a recess. The record does reflect that defense counsel *did attempt* to talk to the defendant (Tr. at p. 1341 lines 3-7)—apparently to answer a question that the petitioner had and to advise him of his rights on cross-examination (Tr. at p. 1341 lines 18-20). Thus, the respondents' fourth objection is also without merit. The record clearly indicates that petitioner would have conferred with counsel *but for* the trial judge's prohibition. (Tr. at p. 1341 lines 3-7).

Finally, the trial judge's compelling reason for sequestration, asserted by the respondents in their third objection, is precisely the fear of coaching discounted by the Fourth Circuit in *United States v. Allen*, 542 F.2d 630, 633-34 (4th Cir. 1976). Although petitioner does not have a right to be coached on cross-examination, the petitioner does have a right to counsel during a brief recess and the petitioner need not demonstrate prejudice from the denial of that right. *Stubbs v. Bordenkircher*, 689 F.2d 1205, 1206-07 (4th Cir. 1982).

In this case, counsel is on record indicating his desire to answer his client's question during a court recess. The trial judge acknowledged on the record that he did, in

fact, prohibit any communication. Accordingly, the writ shall issue unless the state elects to retry the petitioner within seventy days of the date on which any appeals herefrom become final, or within seventy days of the date on which the time for filing any appeal herefrom expires, whichever occurs last.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
United States District Judge

DATED:

At Florence, South Carolina

June 24, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-7645

DONALD RAY PERRY,
Plaintiff-Appellee,

versus

WILLIAM D. LEEKE, Commissioner,
South Carolina Department of Corrections;
ATTORNEY GENERAL OF SOUTH CAROLINA,
Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia
C. Weston Houck, District Judge—(CA-85-2992)

Argued: June 1, 1987 Decided: November 5, 1987

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting in banc.*

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* Judge Ervin did not participate in the hearing or decision of this case.

WILKINSON, Circuit Judge:

Donald Ray Perry was convicted of murder, kidnapping, and criminal sexual assault. He sought a writ of habeas corpus on the ground that he was not permitted to confer with his counsel during a fifteen minute trial recess between direct and cross-examination. The district court ordered that the writ should issue unless Perry was retried within a reasonable period. Because any error at the state trial did not prejudice Perry under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), we reverse the judgment of the district court and remand with directions to dismiss this petition.

I.

On March 5, 1981, Mary Heimberger had dinner with two friends at a restaurant in Richland County, South Carolina. After dinner, she left the restaurant alone in her own car. She was not seen again until March 7, when two boys found her dead body in a wooded area. Donald Ray Perry's fingerprint was later found on Heimberger's car; tire tracks from Perry's car were also found on the scene, as were prints of Perry's shoes. After police arrested Perry, he confessed that he had shot Heimberger, but said it was an accident.

A medical examination of Heimberger's body indicated that someone had raped her, attempted to strangle her, shot her in both kneecaps, and then shot her fatally in the chest. The entrance to her vagina had been bruised and torn. Following Heimberger's death, a large stick had been shoved into her rectum and left there.

Perry's jury trial began on September 21 and ended on October 2. The defense called many witnesses, including Perry himself. On September 29, the trial judge ordered a fifteen minute recess after Perry completed his direct testimony. Perry's counsel sought to speak to him during the recess, apparently to answer a question Perry had and to advise him of his rights on cross-examination.

The trial court did not allow the consultation, explaining that Perry "was not entitled to be cured or assisted or helped approaching his cross-examination." Perry's counsel objected, and the objection was overruled.

Perry was convicted. The state of South Carolina sought the death penalty for Perry; the jury recommended a sentence of life imprisonment. On October 5, the trial judge sentenced Perry to life imprisonment for murder, life imprisonment for kidnapping, and thirty years' imprisonment for criminal sexual conduct in the first degree.

Perry argued before the Supreme Court of South Carolina that he had been denied his Sixth Amendment right to counsel because he was not allowed to speak with his lawyer during the fifteen minute recess between direct and cross-examination. The state Supreme Court rejected this argument. Because Perry had been sentenced to life imprisonment for murder, however, that court reversed the sentence for life imprisonment for kidnapping under South Carolina law. *State v. Perry*, 278 S.C. 490, 299 S.E.2d 324 (S.C. 1983). The United States Supreme Court denied certiorari. *Perry v. South Carolina*, 461 U.S. 908 (1983).

In November of 1985, more than four years after his trial and more than two and one-half years after the denial of certiorari, Perry sought a writ of habeas corpus in federal district court. The district court granted relief on the basis of our earlier decisions in *United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977), and *Stubbs v. Bordenkircher*, 689 F.2d 1205 (4th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983), which held that it is always reversible error for a trial court to prevent a defendant and his counsel from conferring during a recess, no matter how brief.

We granted *en banc* review to determine whether *Allen* and *Stubbs* continue to govern in light of the Supreme Court decisions in *United States v. Cronic*, 466

U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984). For the reasons expressed in *Allen*, we believe the bar order at issue here was error. We also believe, however, that the reasoning of *Strickland* and *Cronic* mandates reversal only if that error was prejudicial.

II.

We begin by sketching briefly the legal context. The right to counsel is, without question, a fundamental right of criminal defendants. Some interferences with this right pose such a fundamental threat to a fair trial that reversal of a conviction is automatic. *Cronic*, 466 U.S. at 658-59 (1984); *Strickland*, 466 U.S. at 692; *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Not every limitation of the relationship between a defendant and his attorney violates the defendant's right to counsel, however. A trial court is not required, for example, to interrupt trial proceedings whenever a defendant and his attorney express a desire to confer. Moreover, other deprivations at trial, such as ineffective assistance of counsel, do not amount to a denial of the right to counsel requiring automatic reversal of a conviction; such a deprivation constitutes grounds for reversal only if prejudicial. *Cronic*; *Strickland*. A barrier to consultation might thus amount to a fundamental denial of the right to counsel, requiring reversal; a lesser deprivation, requiring reversal only if it is prejudicial; or no deprivation at all.

Here we must determine the appropriate treatment of an order barring consultation during a brief, routine recess. The Supeme Court's decision in *Geders v. United States*, 425 U.S. 80 (1976), is the starting point. *Geders* held that a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his attorney during an overnight recess. The opinion emphasized the importance of an overnight recess, which gives "the defendant a chance to

discuss with counsel the significance of the day's events," to make tactical decisions, and to review strategies for the remainder of the trial. *Id.* at 88.

The concurring opinion of Justice Marshall, joined by Justice Brennan, argued that the same rule of automatic reversal was "fully applicable to the analysis of *any* order barring communication between a defendant and his attorney." *Id.* at 92 (emphasis in original). The opinion of the Court, however, did not go so far. The majority stated that "an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day" was "a matter we emphasize is not before us in this case." *Id.* at 89 n.2. The Court later repeated this caveat:

> The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not reach, limitations imposed in other circumstances.

Id. at 91.

While there is a division among the circuits, the majority have generally extended the *per se* reversal rule of *Geders* to cover lesser restrictions on consultation. The Sixth Circuit has extended *Geders* to cover a one-hour lunch recess. *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976). The Fifth and Eleventh Circuits have held that *Geders* covers any recess, no matter how brief. *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986) (en banc); *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980). The District of Columbia Circuit and the Eighth Circuit have indicated agreement with this view in *dicta*. *Mudd v. United States*, 798 F.2d 1509, 1511 (D.C. Cir. 1986); *United States v. Vesaas*, 586 F.2d 101, 102 n.2 (8th Cir. 1978). The Second Circuit has rejected this view, however, applying harmless error analysis instead. *United States v. DiLapi*, 651 F.2d 140,

147-48 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982); *United States v. Leighton*, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968).

In *Allen*, a panel of this circuit addressed the issue left open by the majority opinion in *Geders* and adopted the position of Justice Marshall's concurrence. The panel stated that "a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible" and that reversal would be necessary whether or not the restriction was prejudicial. 542 F.2d at 634.

Later, in *Stubbs*, we qualified *Allen* slightly to require the petitioner "to show that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." 689 F.2d at 1207. Because the defendant in *Stubbs* had not objected to the restriction and because neither petitioner nor his attorney had requested permission to confer, the habeas petition was denied. In the present case, Perry's counsel objected to the restriction when he learned of it, so the *Stubbs* requirement has been satisfied.

III.

It is clear that *Allen* and *Stubbs* would govern in this case in the absence of the Supreme Court's recent decisions in *Strickland* and *Cronic*. The Court's analysis of the Sixth Amendment in those cases, however, requires us to reexamine our own analysis in *Allen* and *Stubbs*. We believe that the *per se* reversal rule of those cases cannot be squared with the analysis of *Strickland* and *Cronic*, and must be replaced with an inquiry into prejudice.

The Supreme Court held in *Strickland* and *Cronic* that ineffective assistance of counsel at trial does not require reversal of a conviction unless the deficient performance of counsel was sufficiently prejudicial. "The defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. At the same time, the Court reaffirmed its previous cases, including *Geders*, which held that the complete denial of counsel at a critical stage of trial is automatically grounds for reversal. *Cronic*, 466 U.S. at 659 & n.25.

Strickland and *Geders* do not imply, however, that Sixth Amendment claims can be mechanically divided into a typology requiring automatic reversal when there is a "denial of counsel" and a prejudice analysis where there is "ineffective assistance." The determinative factor in analyzing a Sixth Amendment claim is not the label to be attached to the alleged deprivation. The Supreme Court has recognized as much by alternately describing *Geders* as a case involving the denial of counsel, *Cronic*, 466 U.S. at 659 n.25, and as a case involving ineffective assistance. *Strickland*, 466 U.S. at 686[1] Instead, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Strickland and *Cronic* held that because the purpose of the Sixth Amendment "is simply to ensure that criminal

[1] Other circuits have likewise applied different labels. The Eleventh Circuit, sitting *en banc*, recently found that a bar on consultation during recess constitutes a denial of the assistance of counsel, requiring automatic reversal. *Crutchfield v. Wainwright*, 803 F.2d 1103, 1108 (11th Cir. 1986). The Fifth Circuit, ruling prior to *United States v. Cronic*, 466 U.S. 668 (1984), held that a bar during any recess requires automatic reversal, but cast its rule as a means of protecting the "right to the effective assistance of counsel." *United States v. Conway*, 632 F.2d 41, 644-45 (5th Cir. 1980). Similiarly, the Distirct of Columbia Circuit and the Second Circuit have apparently assumed that the right involved was the right to effective assistance of counsel. *Mudd v. United States*, 798 F.2d 1509, 1513 (D.C. Cir. 1986); *United States v. Leighton*, 386 F.2d 822, 823 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968).

defendants receive a fair trial," *id.* at 689, the analysis of claims alleging violations of the right to counsel always focuses on prejudice. Automatic reversal is warranted only where prejudice can be presumed:

> [The right to the effective assistance of counsel is not recognized for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated . . . . There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Cronic, 466 U.S. at 658. *See also Strickland*, 466 U.S. at 692.

In *Cronic* and *Strickland*, the petitioners contended that they had been deprived of their Sixth Amendment rights because they had been represented by allegedly incompetent or inadequate counsel. Such a deprivation is far more likely to have a prejudicial effect than the deprivation at issue here. Perry had very competent attorneys with whom he was able to confer during an overnight recess the night before and during a luncheon recess immediately prior to his testimony. It would make little sense to maintain a *per se* rule of reversal for a brief restriction on consultation, but to inquire into prejudice if Perry had been represented incompetently throughout. The existence of prejudice from a restriction such as this one is necessarily tied to the surrounding facts; it cannot be and will not be presumed to have so infected the entire trial that no course other than reversal of this conviction is conceivable.

The quality of Perry's representation belies the need for a rule of automatic reversal. He was represented by two attorneys, Mr. Fairey and Mr. Mullineaux, who were present and active throughout the case. The defense pre-

sented some twenty-seven witnesses in Perry's behalf. Cross-examination of government witnesses was vigorous throughout. In all different stages of the trial—from jury selection through closing argument, from the guilt phase through the sentencing phase—this defendant was well served and ably represented. The trial judge commended Perry's counsel on the record for their competency and zeal, adding that he hoped "that all my lawyers would be equally prepared and dedicated to their cases." It would be far too simplistic to equate this case with those cases where judgment was rendered on an uncounselled defendant and to lump them all together under a "right to counsel" rubric which requires automatic reversal. The law must be sensitive to matters of degree, here the fact that for all but the tiniest fraction of trial time defendant consulted with counsel and was championed by counsel in the best traditions of adversary justice.

Because the state trial proceedings met the requirements of *Geders*, our holding is consistent with that decision. This was a lengthy trial, and there were eleven different recesses prior to Perry's testimony, including two overnight recesses, one weekend recess, and significantly, a luncheon recess immediately before Perry took the stand. At each of these recesses, there was no restriction on Perry's access to his counsel. During Perry's direct examination, a recess was also held at the request of a juror; Perry was not barred from access to counsel at that time either. After Perry's testimony, there were recesses of varying durations—fifteen minute recesses, luncheon recesses, and overnight recesses—during all of which Perry and his counsel were able to consult. Thus the bar order at issue here applied to but one of many recesses, and a brief one at that.

The restriction at issue in *Geders* posed so great a danger to a fair trial that prejudice could be presumed. Its duration was extreme (a seventeen-hour overnight recess) and it occurred at a time when defendant and his counsel

could have expected to confer. In contrast, the restriction here was not only brief, but occurred during an unscheduled recess during trial. Perry and his counsel had no entitlement to a recess at this time and had no reason to expect a recess to occur by chance between direct and cross-examination. In a majority of instances, cross-examination of a witness follows direct examination without a break. *See Geders*, 425 U.S. at 90. Because Perry had no entitlement to this recess, the dissenters' speculation on what valuable services counsel may have rendered is simply misdirected. New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult. To reverse automatically a conviction because of an absence of consultation during one brief, fortuitous recess in a trial which spanned nearly two weeks would be to confer a benefit upon a criminal defendant who may not deserve it. The imprecision of a *per se* approach is thus apparent. The proper inquiry is whether this trial was unfair, whether this defendant suffered prejudice, whether this conviction was infirm—in short, whether justice was done in *this* case.

IV.

A *per se* rule of reversal is "the exception and not the rule" under any circumstances, *Rose v. Clark*, 106 S. Ct. 3101, 3106 (1986). To promulgate such a rule in these circumstances would be doubly inappropriate. The Supreme Court has held that "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). A federal habeas court must assure itself that state process did not go seriously amiss. The role of the habeas court is not to flyspeck state proceedings, however, but to focus on their "fundamental fairness." *Strickland*, 466 U.S. at 696.

Collateral review of state convictions by federal courts undermines the finality of those convictions, degrades the

prominence of the trial itself, and creates strains in our federal system. *See Engle v. Issac*, 456 U.S. 107, 127-28 (1982). Most serious here, though, are the costs associated with retrying a defendant who obtains habeas relief. While the district court's order might result in a retrial rather than release for Perry, the "[p]assage of time, erosion of memory, and dispersion of witnesses" may as a practical matter make a second prosecution difficult. *Id.*

Even if an effective retrial is possible, it imposes enormous costs on courts and prosecutors, who must commit already scarce resources "to repeat a trial that has already once taken place." *United States v. Mechanik*, 106 S. Ct. 938, 942 (1986). It imposes costs on victims who must "relive their disturbing experiences." *Id.* at 942. *See also Morris v. Slappy*, 461 U.S. 1, 14 (1983). While "prejudicial error" would require a retrial regardless of the inconvenience, *id.*, those who participated in the initial proceedings should not be compelled to confront these dreadful events a second time if the first trial has been fair. Retrials, moreover, may lack the reliability of the initial trial where witness testimony was unrehearsed and witness recollections were more immediate.

The costs associated with retrial, and the possibility that changed circumstances may make retrial less reliable or even impossible, *Engle*, 456 U.S. at 127-28, are likely to be especially high in this case. Perry did not file his petition for a writ of habeas corpus until more than four years after his trial and more than two and one-half years after the Supureme Court denied his petition for certiorari. As the Supreme Court noted in *Mechanik*, these costs "are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has no effect on the outcome of the trial." 106 S. Ct. at 943.

V.

The sole remaining issue, therefore, is whether Perry suffered prejudice because of the state court's bar order. We hold that he did not.

The standard of prejudice under *Strickland* is whether defendant received a "fair trial" in which "evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685. On the basis of the record before us there can be no legitimate fear that the trial court's order jeopardized Perry's "ability . . . to receive a fair trial," *Cronic*, 466 U.S. at 658, and there can be no doubt that Perry received "the assistance necessary to justify reliance on the outcome" of his trial. *Strickland*, 466 U.S. at 692.

There is no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross-examination. There is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior to his taking the stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course" necessary. Further, it is clear from the record that Perry took full advantage of his rights on cross-examination and placed his version of events before the jury.[2]

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[2] Perry was anything but a passive witness on cross-examination. He was able to resist attempts by the prosecution to color his story, and he was able to tell his own version of events. For example, he was asked about his familiarity with the victim's apartment:

> Q. All right. So you don't remember then going out to this apartment complex, do you?

[Continued]

The evidence against Perry was overwhelming. Tire tracks from Perry's car were found at the murder scene, as were Perry's footprints. His fingerprint was found on

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[2] [Continued]

A. I don't even know where these complexes is as I have stated.

Q. Well, that's where Mrs. Heimberger lived. That's where she was living on March the 5th. Do you remember going out there in your car and locking up your car somewhere in this area?

A. How many times I got to tell you? I don't know where this complex is. I don't know where the complex is.

. . .

Q. Do you remember, sir, going out there and getting in the car with Mrs. Heimberger? Do you remember that?

A. I refuse to answer that. I have already stated that I have not—I have no knowledge of where these complexes is if that's the only question you have to ask me.

He corrected the prosecution when questioned about his gun:

Q. You put [the gun] in your car in your possession, right?

A. At what time are you talking about? When?

Q. Well, sir, when you took it in and cleaned it the first time before you went over to Bumpsie's, you intentionally put it in your vehicle, didn't you?

A. No, I didn't.

Q. You did not put it in your vehicle?

A. No, I didn't.

Q. I thought I heard you say you put it under the floorboard, the floormat?

A. I did under the floormat of my mother-in-law's car.

He told his own version of events when questioned about his fingerprint:

Q. Can you tell me, sir, how your fingerprint got on Mrs. Heimberger's automobile?

. . .

A. Oh, well, as I was searching her vehicle.

. . .

[Continued]

the victim's car. Perry admitted, at one point, to shooting the victim, but claimed the shooting had been an accident. He later admitted to having sexual relations with the victim against her will on the night of her murder, but claimed that he did so under duress.

The vigor of Perry's representation throughout by a team of two able attorneys, the length of the trial and the utter brevity of the bar order, the presence of consultative recesses shortly before Perry's testimony, and the absence of any other colorable assignment of error to any other aspect of these prolonged proceedings persuade us that the possibility of prejudice is utterly remote. While a disputed question of material fact as to prejudice would

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[2] [Continued]

Q. How did you come to get in the particular location that it was found if you were searching her vehicle?

A. What you mean in the particular location?

Q. You were on the inside searching the car, weren't you?

A. I was sitting in the front seat with my left foot in it.

Q. Sitting in the front seat. Well, were you aware that the fingerprint was taken on the outside of the window and not on the inside?

A. Yes, I am aware of that.

Q. So you must have put it on there before you got in, is that what you're saying?

A. No, my fingerprints could have been put on the window after I grabbed on to the window and the door when Duke-Dog was driving off.

Perry also took advantage of his right to explain his answers on cross-examination. For example, when shown his time card, which indicated that he had gone to work the day after the murder, he testified as follows:

Q. That's your time card where you went to work that day, wasn't it?

A. It has on here Friday P.M. 12:09 but it also had in handwriting 3-6-81 that anybody could put down.

require a remand, we are unpersuaded that an evidentiary hearing is necessary on this record.[3]

VI.

The gravity of a criminal conviction requires that courts strive to make criminal proceedings as fair and flawless as possible. While the courts must do everything they can to protect the rights of accused persons, they must not lose sight of the inevitability of imperfection in our criminal justice system. It would be wrong to exalt technical perfection at the expense of our society's legitimate and weighty interest in punishing offenders. Where error in a criminal trial is not of the variety that threatens its reliability, rules of *per se* reversal are unwarranted. A defendant who suffers such an error must be given the opportunity to show that he had been prejudiced thereby, but he ought not to reap a windfall where he has not been injured.

Because Perry was not prejudiced by the trial court's restriction, the judgment of the district court is reversed and remanded with directions to dismiss this petition.

REVERSED AND REMANDED.

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[3] Chief Judge Winter's dissent contends that the application of a prejudice analysis in this case is likely to lead to interference with the attorney-client relationship. This case raises no such danger, however, because the clear absence of prejudice has obviated the need for any inquiry into that relationship. We therefore see no need to address this concern in this case, and we do not address it.

We note, however, that there may be cases which do raise this concern. Requiring a defendant to show prejudice in those cases might require him to reveal privileged confidences. *See Redman v. Bailey*, 657 F.2d 21, 24 (3d Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982). The prejudice inquiry under *Strickland* and *Cronic* may pose a similar dilemma. In those cases the Supreme Court placed on the defendant the burden of showing that he had been prejudiced by the ineffective assistance of counsel, 466 U.S. 687; 466 U.S. 658. *Strickland* and *Cronic* did not, however, address the question of burden allocation where judicial error, rather than the shortcomings of defense counsel, is at issue. The absence of prejudice under any allocation makes it unnecessary for us to address that question here.

WINTER, Chief Judge, dissenting:

Few categories of constitutional error so undermine the adversary system as to warrant reversal without any proof of prejudice in a particular case. Denial of the assistance of counsel during a critical stage of criminal proceedings is one such category of error. Whether the deprivation of counsel spans an entire trial or but a fraction thereof, it renders suspect any result that is obtained.

The Supreme Court has long recognized the indispensable role in the adversary process that is played by legal counsel. The Court invokes a strong presumption that counsel perform competently in this role, and defers routinely to what are invariably characterized as an attorney's "strategic" decisions. As a necessary corollary to this principle, however, we must accept the consequences of preventing an attorney from performing that vital role. The majority here does not deny that the district court committed an error of constitutional magnitude. Rather than create arbitrary lines below which we pretend to some assurance that prejudice is unlikely, we must recognize the concomitant presumption that a denial of counsel—for whatever length of time—is a denial of constitutional right and that a conviction obtained where there has been such a denial cannot stand.

I.

In Geders v. United States, 425 U.S. 80 (1976), the Supreme Court overturned a conviction obtained after defendant was precluded from consulting with his attorney during a seventeen-hour overnight recess between his direct and cross-examination. The Court held that defendant's Sixth Amendment right to counsel had been violated, and reversed and remanded the case without any inquiry into whether the violation had resulted in actual prejudice to defendant. The opinion noted, however, that the effect of a similar communication bar imposed during "a brief

routine recess" in the trial was not before the Court. 425 U.S. at 89 n.2.

The issue reversed in *Geders* was first addressed by us in United States v. Allen, 542 F.2d 630 (4 Cir. 1976), *cert. denied*, 430 U.S. 908 (1977). We held in *Allen* that

> the Sixth Amendment right to counsel . . . is so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason.

542 F.2d at 633. We deemed insufficient to justify even a brief encroachment on the right to counsel the fear that defense attorneys would engage in unethical coaching—the only rationale offered in support of the trial court's action here. We also refused to credit the assumption that many attorneys would flout their ethical obligations. Moreover, we noted that improper coaching can be deterred by knowledge of the prosecution's ability to inquire about such coaching during cross-examination. The few attorneys whose scruples are more easily overcome will nonetheless achieve little in a few minutes time, and will focus instead on pretrial efforts which the court is, in any case, powerless to prevent. As Justice Marshall, joined by Justice Brennan, remarked in his concurrence in *Geders*,

> I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.

425 U.S. at 93. Accordingly, we concluded in *Allen* that "the Sixth Amendment right to counsel ought to prevail over the extremely limited value of circumscribing that right for perhaps 20 or 40 minutes during the course of

a trial day." 542 F.2d at 633. We rejected the idea of conducting a case-by-case assessment of whether a defendant had been prejudiced by a given deprivation of counsel; "the administration of such a rule . . . would not be worth its cost." *Id.*

Six years later, in Stubbs v. Bordenkircher, 689 F.2d 1205, 1206 (4 Cir. 1982), *cert. denied*, 461 U.S. 907 (1983), we reaffirmed our holding in *Allen*:

> We think the district court properly concluded that any restriction upon a defendant's access to his counsel during a recess, whether the recess be extended or brief, is constitutionally impermissible; and, further, that a petitioner such as Stubbs is not required to demonstrate prejudice.

We added the requirement, however, that defendant prove that his right to counsel was actually denied i.e., "that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." *Id.* at 1207.[1]

---

[1] The government argues that this latter requirement was not met in this case because there is no proof that Perry desired to consult with his attorney during the break—only that his attorney wished to speak with Perry. This distinction is untenable. As Perry argues, it is the function of defense attorneys to speak on behalf of their clients in addressing the court. Indeed, an attorney's continual presence is constitutionally required precisely because the defendant will often be unable to gauge for himself when he is in need of legal assistance. *See* Strickland v. Washington, 466 U.S. 668, 685-89 (1984); *Geders*, 425 U.S. at 88-89. When examined in context, it is clear that the opinion in *Stubbs* would recognize an objection made by *either* the attorney or defendant himself. *See* 689 F.2d at 1207. *See also* Crutchfield v. Wainwright, 803 F.2d 1103, 1109 (11 Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3235 (1987) ("If the record reflected such a desire [to consult] by either [defendant or his attorney], we would find that the trial judge's admonition [against such consultation] constituted reversible error"). Moreover, *Geders* itself involved an objection registered solely by the defendant's attorney.

II.

The majority in this case holds that two recent Supreme Court decisions have undercut *Allen* and *Stubbs*.[2] I cannot agree.

In Strickland v. Washington, 466 U.S. 668 (1984) the Supreme Court established a two-part test for analyzing claims of ineffective assistance of counsel: a defendant must prove that the assistance was "deficient," and that he was so prejudiced thereby that the result of the trial is rendered unreliable. 466 U.S. at 687-90. In United States v. Cronic, 466 U.S. 648, 660-62, 666 (1984), the Court held that there are some limited circumstances in which ineffectiveness may be "properly presumed without inquiry into [counsel's] actual performance at trial," but that such was not the case there. Neither of these decisions dictates a different result in *Allen* or *Stubbs*; to the contrary, they support the analysis employed in those earlier cases.

Unlike *Allen*, *Stubbs* and the case at bar, both *Strickland* and *Cronic* involved defendants who had full access to their attorneys; the question in each of those Supreme Court decisions concerned the adequacy of the performance of the attorneys. Indeed, in both *Strickland* and *Cronic*, the Court was careful to distinguish cases in which a defendant's access to counsel was denied at some key point during the trial. *Cronic*, 466 U.S. at 659 n.25 ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *See, e.g.*, Geders v. United States, ..."); *Strickland*, 466 U.S. at 692. *See also* Green v. Arn, 809 F.2d 1257, 1262-63 (6 Cir. 1987) *pet. for cert. filed* (Apr. 24, 1987); Crutchfield v. Wainwright, 803 F.2d 1103, 1106-09 (11 Cir.

[2] It is interesting to note that the government made no such suggestion in its brief.

1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3235 (1987) ("*Cronic* and *Strickland* make clear that 'where actual or constructive denial of assistance of counsel occurs a per se rule of prejudice applies'" (citation omitted)); Siverson v. O'Leary, 764 F.2d 1208, 1216 (7 Cir. 1985) (*Strickland* and *Cronic* explicitly treat as separate and distinct cases involving the denial of counsel and cases involving ineffective assistance).

There are several justifications for this distinction. As the Supreme Court noted in *Cronic*, 466 U.S. at 658-59:

> There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. [footnotes omitted]

Accord Strickland 466 U.S. at 692; *Crutchfield*, 803 F.2d at 1108-09. If the denial occurs at a critical stage of the proceedings, its duration should make little difference. *See* Delaware v. Van Arsdall, 475 U.S. ——, 89 L. Ed. 2d 674, 685 (1986) ("some constitutional errors—such as denying a defendant the assistance of counsel at trial . . . —are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case"); *Geders*, 425 U.S. at 88-89, *quoting* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("[A criminal defendant] requires the guiding hand of counsel at every step in the proceedings against him"); *Crutchfield*, 803 F.2d at 1108 (any denial of counsel constitutes reversible error and requires a new trial); United States v. Bryant, 545 F.2d 1035, 1036 (6 Cir. 1976). Indeed, as Justice Marshall observed in his *Geders* concurrence, "the general principles adopted by

the Court today are fully applicable to the analysis of *any* order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial." 425 U.S. at 92 (emphasis in original).

Our system of criminal justice is grounded on the premise that the adversarial process yields fair and reliable results. This process can achieve that result only when there are present reasonably effective advocates on each side. As the Supreme Court explained in *Strickland*, "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. at 685. Because of the difficulties in second-guessing strategic decisions made in the heat of a trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. Thus, once a defendant's fate is placed in the hands of an attorney, courts are loathe to impugn the resulting verdict as unfairly procured. However, that presumption of fairness is triggered only when the attorney is allowed to do his job. It follows that a defendant's ability to confer with his attorney at every critical stage is a prerequisite to invoking the presumption that the result is a just one. *See Cronic*, 466 U.S. at 659 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"). Accordingly, the heavy burden imposed on complaining defendants in ineffective assistance cases like *Strickland* and *Cronic* has no relevance in cases alleging a complete denial of such assistance at a critical juncture:

> The crucial premise on which the *Strickland* formula rests—that counsel was in fact assisting the accused during the proceedings and should be strongly presumed to have made tactical judgments "within the wide range of reasonable professional assistance," 104 S. Ct. at 2066—is totally inapplicable when counsel was absent from the proceedings and unavailable to make any tactical judgments whatsover.

Siverson, 764 F.2d at 1216. The same presumption that requires a demonstration of prejudice in establishing claims of ineffective assistance simultaneously renders unnecessary such a requirement for claims of denial of assistance.

III.

One reason cited by the *Strickland* Court for endorsing a strong presumption of effective assistance is the concern that "intrusive post-trial inquiry into attorney performance or . . . detailed guidelines for its evaluation" risks interfering with the attorney-client relationship and deterring ardent and independent advocacy. *See* 466 U.S. at 690. It is precisely those risks, however, which are likely to result from application of *Strickland*'s requirement of proof of prejudice in cases alleging denial of assistance. Bailey v. Redman, 657 F.2d 21, 24 (3 Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982) (rejecting prejudice requirement for this reason). As the District of Columbia Circuit recently explained:

> The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that *did* take place, to see if defendant nevertheless received adequate assistance.
>
> We cannot accept a rule whereby private discussions between counsel and client could be exposed in

order to let the government show that the accused's sixth amendment rights were not violated.

Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986) (emphasis in original).[3] The majority ostensibly avoids this predicament by foregoing any assessment of prejudice in this case, and choosing instead to label harmless, as a matter of law, the fifteen-minute deprivation of counsel to which Perry was subjected. Such an approach, while expedient in this instance, provides neither a logical nor lasting solution to the problem.

As noted above, any denial of a defendant's access to counsel, no matter how long, is presumptively prejudicial if it occurs during a critical stage of the proceedings. The non-monetary value of an attorney's assistance is not measured solely, or even primarily, in hours and minutes. It is not difficult to conceive of situations in which a ten or fifteen minute recess could be critical to the outcome of a trial. It may be that counsel during direct examination had a new thought as to a possible helpful inquiry which could be made on rebuttal if defendant's recollection of this information was not triggered until defendant appeared on the witness stand. *See, e.g., Allen*, 542 F.2d at 633. It may be that counsel during direct examination had a new thought as to a

[3] Another justification for requiring the defendant to demonstrate prejudice is to ensure that there has actually been a Sixth Amendment violation, i.e., an impairment of "the reliability of the trial process." *Cronic*, 466 U.S. at 658. In this case, however, the requirement that a defendant prove an actual deprivation of counsel —that there would have been consultation but for the court's order—serves the same purpose. Had the attorney been permitted to consult with his client, we could have assumed that he would have performed competently so as to trigger the presumption of a fair and reliable result. Conversely, once it is assumed that, but for the court's intervention, the attorney would have been performing his advisory function, it follows that the denial of his assistance was presumptively detrimental and casts doubt upon the fairness and reliability of the trial itself.

possible inquiry which could be made on rebuttal if defendant's proposed answer were only known. It may be that the prosecution elicited from defendant unanticipated and damaging testimony which defendant can effectively neutralize, but only if he can explain the situation to his attorney so that the latter can ask the appropriate questions during rebuttal. Even an attorney's soothing assurances to a defendant, prior to cross-examination, along with reminders of the rules for such testimony, could have a marked effect on a defendant's performance and demeanor on the stand. Other examples can be posited, but the possible situations in which the assistance of counsel may be critical are too numerous for exhaustive treatment here. Their only common threads are the irrelevance of the duration of the deprivation of counsel or the fortuity of the circumstances giving rise to the deprivation.[4] Indeed, deprivation during an overnight recess, which the majority acknowledges to require automatic reversal, may entail an effective deprivation of little more than the fifteen minutes at stake here because many attorneys will devote the vast majority of such an extended break to preparation for the next day of trial, while sending the client home to sleep, or back to jail.

Even were I to concede that duration is determinative of prejudice, I would nonetheless find the majority's position insupportable. In the majority's view, there lies somewhere between the seventeen hours in *Geders* and the fifteen minutes in the instant case a period of time above which all deprivations of counsel are prejudicial

[4] The majority opinion suggests that because Perry has no entitlement to a recess, the aid which his counsel may have given him during the fortuitous one which occurred is simply irrelevant. This, it seems to me, stands Sixth Amendment precedents on their head. It is not the fortuity of the opportunity that a defendant has to consult counsel that is important. It is the services that counsel could render.

per se, and below which they are invariably harmless. Divination of the dividing point between these critical periods is, to my mind, an impossible task. Such an endeavor will require either an arbitrary selection, unrelated to the existence or probability of actual prejudice, or the very type of case-by-case inquiry which the *per se* approach wisely seeks to avoid. In either situation, it is the delicate and time-honored attorney-client relationship, and its pivotal role in our adversary system, that suffers.

Most circuits that have considered the issue have adopted a *per se* rule under which deprivations of counsel during critical stages of a trial are held to warrant reversal without a finding of prejudice. *Crutchfield*, 803 F.2d at 1109. *See, e.g., Green*, 809 F.2d at 1263 (6 Cir. 1987) (defendant need merely prove attorney's absence during critical stage—harmless error analysis appropriate only in some instances, such as absence during preliminary hearing, jury deliberations and return of verdict); *Crutchfield*, 803 F.2d at 1109-10 (11 Cir. 1986) (*per se* rule applies once defendant proves consultation would have occurred absent court intervention), *Bailey*, 657 F.2d at 24 (3 Cir. 1981) (no demonstration of prejudice is necessary; defendant must only prove interference with his desire to meet with counsel); United States v. Vesaas, 586 F.2d 101, 102 n.2 (8 Cir. 1978) ("we have grave doubts that even a brief restriction on a criminal defendant's right to confer with counsel can be squared with the Sixth Amendment") (dicta).[5] The Second Circuit, while declining to grant an automatic reversal in the case before it at the time, has suggested the possibility or prospective application of a *per se* rule. In United States v. Dilapi, 651 F.2d 140, 147-49 (2 Cir. 1981), *cert. denied* 455 U.S. 938 (1982), the court refused to require reversal where defendant's consultation with counsel was barred during a five-minute recess in the middle of defendant's cross-examination, finding "not even a remote risk of actual prejudice." This was, however, the first ruling in that circuit to deal with a brief recess in the aftermath of *Geders*. Accordingly, the court was careful to note:

> We need not determine whether a similar instruction would require reversal in cases arising hereafter without regard to actual prejudice. It is sufficient to state that the instruction should not again be given.

Id. at 149.

A *per se* rule of reversal for all deprivations of counsel would pose no grave threat to the administration of the criminal justice system. A prophylactic rule of the type advocated here would be extremely easy to follow. As the court in *DiLapi* apparently recognized, *supra*, once a rule is announced that proscribes any judicial interference with attorney-client consultations, there is no reason to believe that trial courts will deviate therefrom. In those rare cases where deviations are nonetheless contemplated, the advantages of a *per se* rule will still outweigh its costs. As the Supreme Court observed in *Geders*,

> There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in

[5] The Seventh Circuit does not require defendants to prove prejudice, as in *Strickland*, but does permit the government to prove that the error was harmless beyond a reasonable doubt. *Siverson*, 764 F.2d 1208, 1217 (7 Cir. 1985).

favor of the right to the assistance and guidance of counsel. Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972).

425 U.S. at 91.

In sum, I do not believe that *Strickland* and *Cronic* necessitate reconsideration or modification of this circuit's precedents, nor do I believe that any modification is desirable. Any deprivation of the right to counsel, a right which lies at the foundation of our system of criminal justice, warrants reversal without proof of prejudice, and the Supreme Court has consistently so held. I see no justification for the exception created by the majority.

Accordingly, I respectfully dissent.

Judge Phillips, Judge Murnaghan, and Judge Sprouse authorize me to say that they join in this opinion.

MURNAGHAN, Circuit Judge, dissenting:

What Chief Judge Winter has written in dissent states eloquently and lucidly why the majority, to my mind, has lapsed into imprecise thinking and disregard of the American Constitution's Sixth Amendment guarantee to the rights to counsel for those accused of crime. I write in dissent only to state additional reasons why that is so.

The majority seems to agree that *United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977), and *Stubbs v. Bordenkircher*, 689 F.2d 1205 (4th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983), both of which indicate there is constitutional error here mandating a new trial, "continue to govern" (majority Slip Op. at 4), except to the extent, if any, the Supreme Court decisions in *United States v. Cronic*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984) may implicitly compel an opposite result. The difference between the two situations is, however, not insubstantial, namely, (a) one is where counsel is fully and effectively denied for part of the trial and (b) the other is where counsel is constantly available to the defendant but acts for part of the time in an ineffective manner. It is logically impossible to argue that *no* counsel is effective counsel. There is simply no counsel effective or ineffective. It is another thing to contend that counsel who was on the scene all the time and available to the defendant was not ineffective or that his ineffectiveness did not occasion prejudice.

The difference stems from the fact that absolute denial of counsel runs up explicitly against the Sixth Amendment guarantee of the right "to have the Assistance of Counsel" while *ineffective* assistance of counsel is not specifically proscribed. Its less favored status derives in part from the impact of the due process provisions of the Fifth Amendment guaranteeing a fair trial, and "due process" which is inevitably a more flexible, less

specific doctrine. *See Strickland*, 466 U.S. at 685. Denial of counsel is a "pure" Sixth Amendment violation.[1] Ineffective assistance is, under *Strickland*, a Sixth Amendment violation, but a violation derived by reference to and under interpretative pressure of the Fifth Amendment.

The reason for that difference, and the difference in result depending on which is applicable, are not difficult to ascertain. Where there is absolute denial of counsel, the error which exists (the majority accepts that the complete barring of counsel during a court recess was error, Slip Op. at 4) is an error attributable to the trial judge. When ineffective assistance is concerned, the judge is not involved in the mistake, the error being that of counsel. Counsel's decisions often are not effectively subject to criticism because of the wide-ranging considera-

[1] The majority attempts to minimize the importance of the distinction, citing cases which have held that where there is a conflict between the unfettered assistance of counsel, on the one hand, and the need for the orderly and efficient procession of the case, on the other, the right to assistance of counsel must give way. The majority relies on *Morris v. Slappy*, 461 U.S. 1, 11 (1983), where it was said:

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. . . . Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.

See also Geders v. United States, 425 U.S. 80, 91, 92 (1976); *United States v. Vasquez*, 732 F.2d 846 (11th Cir. 1984); *Pope v. State*, 440 A.2d 719 (R.I. 1982). However, those cases all focus on avoidance of interruption of a trial to permit the defendant's consultation with counsel. Here the interruption (recess) had already occurred for completely different and independent reasons and lasted for 15 minutes or so. The conference between counsel and client which was sought would not have led in any way to a delay or other disruption of the trial.

tion that he or she must be allowed to make "strategic" decisions. In any event, unlike the situation where there is outright denial of counsel, the judge remains completely unbiased and impartial in the case of ineffective assistance.

In the case of outright denial of counsel, however, he or she who must address the issue before it reaches us has every reason, however subconscious it may be, to find grounds for ruling "no prejudice" in order to sustain his or her action and to avoid the need for a new trial.[2] His or her decision inevitably serves to shape the question as it reaches us on appeal. Such shaping, perhaps biased in a case of total denial such as we have here, is not so biased in the case of counsel always available to defendant but charged with prejudicial ineffective assistance.

It is unlikely that judges would consciously tailor their findings in order to save themselves from being reversed on appeal. We may assume that judges, despite some unjustified generalized suspicions to the contrary, are honorable men and women and would not take a step consciously in derogation of the defendant's rights in order to spare themselves reversal on appeal.

However, a person, on becoming a judge, does not become devoid of human reactions and motivations and the possibility of subconscious motivation cannot be discounted or ignored. It is a bad rule of law which subjects a judge to the temptation. That is perhaps why the rule that denial of counsel for any length of time whenever it could be significant to the defense will result in

[2] If the judge, unmotivated consciously *or unconsciously* by such considerations, would have granted a new trial, we, as appellate judges, would not even confront the issue. Yet the subconscious desire to be thought right is a powerful and common force, and might quite possibly lead to a denial of a new trial when one should have been granted.

a new trial. Here the deprivation of any counsel "could" be prejudicial, and requiring greater proof would, for reasons convincingly alluded to by Chief Judge Winter, be improper as forcing abrogation of the attorney-client privilege.

It is, indeed, surprising that the majority, in light of noisy criticism of the courts for not adhering strictly to the language of the Framers, should proceed so blithely, and on examination with little authority, to ignore the guarantee of assistance of counsel spelled out in the Sixth Amendment. There is simply no satisfactory way to insure that complete denial of counsel was not prejudicial when access to counsel was absolutely forbidden during trial, even if the time involved was but 15 minutes. The Sixth Amendment guarantees "the right to the *effective* assistance of counsel." *Strickland*, 466 U.S. at 686 (emphasis supplied). Deprivations of counsel render assistance ineffective, for assistance simply does not exist, and therefore violation of the Sixth Amendment is clear.

To approach the question on a "strict construction" basis, we would have first to recognize that the applicable constitutional language is the Sixth Amendment guarantee of "assistance of counsel." The next thing to recognize is agreed to by the majority, namely, that there was an error in the denial of that guarantee. The person here involved for the crucial 15 minutes had *no* assistance of counsel. That should be the end of things, unless one wishes to depart from strict construction by adding that the Supreme Court has gone beyond the language of the Framers in the Sixth Amendment by expanding it to read: "*effective* assistance of counsel *at a crucial point in the proceeding*." There can be no doubt that in this case a crucial point in the proceeding was involved. The defendant had just completed his direct examination and was going into cross-examination in a case where he was on trial for his life, the state having sought the death penalty.

Consequently, we have to concentrate at most on the implication of the word "effective." The right guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *Strickland*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).[3]

It seems inescapable that a slight imprecision would not affect the outcome in the matter before the court, but when the court refers in its opinion to some other case, there might be some trivial inexactness in use of words. The question in *McMann* was whether counsel had *incompetently* advised criminal defendants. *Effective* assistance of counsel might be construed, as a linguistic matter, to mean only help that led to a verdict or other finding of not guilty, that being the only truly effective assistance which a defendant is likely to desire. With a little more precision the Supreme Court would have said, making use of the usually scorned double negative, "the right to the *not ineffective* assistance of counsel."

Once we have come so far we understand the rationale behind *Strickland* and *Cronic*. In those cases, assistance of counsel was always provided. If counsel did something that was below professional standards, it was not ineffective simply because even the skill of Clarence Darrow would not have led to a different result. Counsel's error would have been totally harmless. In the case which concerns us here, however, there was not any assistance of counsel, so whether it was effective or ineffective is not a question which arises or can arise. The total denial of assistance of counsel violates the Constitution and that should be the end of the matter.

On the majority's approach, if the defendant was absolutely denied counsel and represented himself, accord-

[3] For our purposes, it is not significant if the addition of the word "effective" marked a departure from "strict construction." The Supreme Court has spoken and we must listen.

ing to later expert testimony, not in accordance with the cliche, as a fool, but apparently as well as any seasoned counsel could have, the defendant could not complain, for the denial would be, according to the approach of the majority, lacking in prejudice. There is an old saying: *cessante ratione cessat ipsa lex.* In this case, not only do reasons cease, but reason itself is absent.

Judge Phillips and Judge Sprouse authorize me to say that they join in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 87-6325

DONALD RAY PERRY,
Petitioner

v.

WILLIAM D. LEEKE, Commissioner,
South Carolina Department of Corrections, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 28, 1988

No. 87-6325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD RAY PERRY,

Petitioner,

v.

WILLIAM D. LEEKE, COMMISSIONER,
South Carolina Department of Corrections, and
THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONER

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Petition for Certiorari Filed January 29, 1988
Certiorari Granted March 28, 1988

QUESTION PRESENTED

Is harmless error analysis appropriate where there is a denial of assistance of counsel during the course of a criminal trial?

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TABLE OF AUTHORITIES

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the South Carolina Supreme Court denying Donald Ray Perry's appeal of his conviction for Murder, Kidnapping and Criminal Sexual Conduct is reported as State v. Donald Ray Perry, 278 S.C. 490, 299 S.E.2d 324 (S.C. 1983), and is reproduced in Joint Appendix [J.A.] at pages 8 through 16. The decision of the United States District Court of South Carolina is an unpublished opinion reproduced in J.A. at pp. 17-19. The decision by the Fourth Circuit Court of Appeals, en banc, is reported as Perry v. Leeke, 832 F.2d 837, (4th Cir. 1987), and is reproduced at J.A. pp. 20-52.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> [I]n all criminal prosecutions, the accused shall enjoy the right,..to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

During the course of Petitioner's criminal trial and after his direct testimony, the trial court, sua sponte, ordered that Petitioner not be allowed to consult with his attorney during a fifteen minute court-ordered recess. This ruling was subsequently addressed by the South Carolina Supreme Court which found that the judicial order barring Petitioner from his

counsel was not inconsistent with this Court's determination in Geders v. United States, 425 U.S. 80 (1976), and that the ruling of the Fourth Circuit Court of Appeals in United States v. Allen, 542 F.2d 630 (4th Cir 1976), was not "binding on the Supreme Court of South Carolina." J.A. p. 12.

Petitioner sought habeas relief in the United States District Court for South Carolina which was granted in an Order issued on June 26, 1986. Upon appeal of this Order by the State of South Carolina, the Fourth Circuit, en banc, reversed the District Court and issued an opinion finding the Sixth Amendment violation to be harmless error under the principles of Strickland v. Washington, 466 U.S. 668 (1984).

A. How the Deprivation of Counsel Occurred at Trial

Petitioner was tried for the

offenses of Murder, Kidnapping and Criminal Sexual Conduct in the First Degree. These charges stemmed from the death of Dr. Mary Heimberger, a University of South Carolina professor, in March of 1981. Subsequent to his arrest, the Petitioner was committed to the South Carolina State Mental Hospital where he was found incompetent to stand trial due to a mental condition known as hysterical reaction. After a three month commitment in the hospital, the Petitioner was returned to the custody of the Sheriff of Richland County.

On September 21, 1981, trial began in which the State of South Carolina sought the death penalty. The State rested its case on September 29, 1981, in the mid-morning. The Petitioner presented two short witnesses prior to taking the stand in his own defense. Petitioner's trial counsel informed the trial court that his testimony would be lengthy and the trial

court recessed for lunch. (Tr. p. 663). Following the luncheon recess, the Petitioner took the stand for a lengthy examination concerning his background and his actions in this case. At one point during direct examination, a juror indicated a desire for a break and the court recessed for five minutes to allow the juror to leave the courtroom. (Tr. p. 705).

At the conclusion of the Petitioner's testimony, the trial court ordered a fifteen minute recess. (J.A. p. 3, Tr. p. 771). Unbeknownst to Petitioner or counsel, the trial court ordered that Petitioner not be allowed to consult with anyone during the break, including his counsel. Upon attempting to consult with the Petitioner during the break, counsel was informed of the order and, at the conclusion of the recess, moved for a mistrial based upon violation of Petitioner's Sixth Amendment right to

counsel. The trial court denied this motion indicating that "he was in a sense then a ward of the court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied." (J.A. p. 5, Tr. p. 773). Subsequently, the trial court acknowledged that Petitioner's counsel would not have improperly advised his client during the break but Petitioner's subsequent motion for mistrial was also denied. (J.A. p. 4, Tr. p. 961).

B. The Allegations Against Petitioner and Defense Presented

The Petitioner was arrested based upon physical evidence found at the scene of Dr. Heimberger's murder. At that time, he professed no knowledge as to the

homicide but admitted that he had been stuck in his mother-in-law's car at the scene late in the evening of Dr. Heimberger's abduction. Shortly after his arrest, Petitioner was interrogated on three occasions prior to the appointment of counsel. During the third interrogation and after being informed that his wife was being interrogated in another room, Petitioner gave a statement indicating that he had accidentally shot Dr. Heimberger but that no sexual contact had occurred. The interrogating officers later testified that the "confession" given by Petitioner was wholly inconsistent with the facts of the case. (Tr. p. 617, ll. 11-16; p. 622, ll. 9-16). These officers also admitted that during the interrogation they tried to convince the Petitioner that he was involved in the homicide (Tr. p. 621, ll. 14-19); and that Petitioner could hear his wife crying loudly in another office where

she was being questioned. (Tr. p. 623, ll. 3-22).

Shortly after the oral statement, the Petitioner was committed to the South Carolina State Mental Hospital where he was diagnosed as suffering from a hysterical reaction and amnesia. (Tr. p. 1091, ll. 4-10). Testing at the hospital indicated that the Petitioner was functioning at a mildly retarded level (Tr. p. 1087, l. 20); was very dependent upon his wife in a childlike manner (Tr. p. 1088, ll. 6-7); and was a passive, nonviolent individual who was easily influenced. (Tr. p. 1089, ll. 2-3). The Petitioner had no memory of the events leading up to his arrest and was suffering from an extreme stuttering and seizure problem for the first time in his life. (Tr. p. 1092, ll. 4-15).

Petitioner's memory was restored through psychiatric medications and the use of sodium amytal (Tr. p. 1100, ll. 9-25).

During the sodium amytal interview some four months after his arrest, the Petitioner was able to recall the events of the evening of the homicide. In reliving the episode he portrayed "the fear, the fright, the tears, crying and whatnot as [he] talked about different parts of the events of that evening." (Tr. p. 1103, ll. 2-3). It was learned during the interview that Mr. Perry had been an unwilling participant in the abduction, rape and murder of Dr. Heimberger. Another individual, Larry Deloach, whose nickname was "Duke-Dog," had forceably abducted Dr. Heimberger while in the Petitioner's company. Following the abduction of Dr. Heimberger, Petitioner testified that "Duke-Dog got out of the car and he told me, say, nigger, you better follow me and you better do what I say do or else I'm gonna take you out." (Tr. p. 751, ll. 4-6). When questioned why he did not drive

off at this point, Petitioner indicated that he was scared and followed the instructions given to him by Deloach. (Tr. p. 752, ll. 11-17). At the scene, the Petitioner testified that he attempted to protect Dr. Heimberger from Deloach but he was unsuccessful. He was forced at gunpoint to have sexual intercourse with the victim. Mr. Perry attempted to rescue Dr. Heimberger by jumping Deloach but when this was attempted, Deloach threw him off and shot the fleeing victim three times. (Tr. pp. 757-766).

Various witnesses were presented by Petitioner to corroborate his version of what occurred. Petitioner testified that while in the State Mental Hospital he was visited by Deloach and that Deloach threatened his family if Mr. Perry mentioned Deloach's name. (Tr. p. 721, ll. 6-18). The fact of Deloach's visit was corroborated by a staff member of the

hospital who also corroborated that Petitioner was upset by Deloach's visit. (Tr. p. 847, ll. 8-9; p. 849, ll. 1-5; p. 853, ll. 11-15). Three additional witnesses testified that immediately prior to the abduction of Dr. Heimberger they saw the Petitioner in the company of Deloach. (Clisby Calhoun, Tr. p. 823; Thelma Wallace, pp. 828, 836-837; Alexander Middleton, pp. 842-843).

Independent testimony was also presented that Dr. Heimberger's automobile was returned to her apartment complex at 11:15 p.m. on the night of the homicide. (Tr. p. 656). Petitioner's mother and sister testified that Petitioner arrived at their home on foot shortly after 11:30 p.m.. (Tr. pp. 856 and 869). Petitioner's automobile was stuck at the scene of the crime and evidence at the scene indicated he had spent considerable time attempting to move his vehicle before walking to his

mother's residence. (Tr. p. 261, ll. 2-7; p. 324, ll. 11 - p. 327). The distance from the scene to Petitioner's home was almost a mile and the distance from Dr. Heimberger's residence to the crime scene was 9.9 miles. (Tr. p. 1019, ll. 1-6). The time and distance testimony was presented to demonstrate the unlikelihood that only one person was involved in the homicide.

Physical evidence from the scene indicated the presence of another person. A hair, appearing to be of Black origin, found in the victim's auto and used as probable cause for the Petitioner's arrest was determined by the F.B.I. not to have been from the Petitioner. (Tr. p. 640, ll. 13-15). As both the Petitioner and Deloach were nonsecretors of the ABO blood factors, the semenal stains found in the victim's auto and on her person could have come from either man. (Tr. p. 630 - 631).

The Petitioner's defense was that of common law duress and that he took no active part in the abduction and homicide of Dr. Heimberger. The weakness in this defense was the failure of the Petitioner to flee during the initial abduction. Expert psychiatric testimony was presented concerning Mr. Perry's inability to resist Deloach's threats (Tr. pp. 1105-1108), but the trial court refused Petitioner's request to instruct the jury to consider Petitioner's mental condition in determining whether Petitioner had a reasonable opportunity to escape. (Tr. pp. 1183 - 1191, 1195).

The trial jury deliberated for six hours and forty-five minutes before requesting that the trial judge reinstruct the issue of duress. (Tr. p. 1331). Following this instruction, the jury deliberated another five and one half hours before finding Petitioner guilty of all

charges. The jury subsequently returned a unanimous verdict of life imprisonment.

SUMMARY OF ARGUMENT

The majority opinion of the Circuit Court found that the Petitioner had been denied the right to counsel by the trial court's order but found under the principles set forth by this Court in Strickland v. Washington, 466 U.S. 668 (1984), that "any error at the State trial did not prejudice Perry." (J.A. p. 21; 832 F.2d 838). While Strickland establishes a standard for determination of prejudice caused by ineffectiveness of counsel, it is an inappropriate standard for application to denial of counsel situations.

The greater standard of prejudice established in Chapman v. California, 386 U.S. 18 (1967), is also inappropriate as Chapman and a series of cases since its

issuance consistently hold that denial of counsel is inappropriate for harmless error analysis.

Application of harmless error during criminal trials has traditionally been applied to situations involving erroneous admission of evidence or improper argument. Courts have determined the effect of such impropriety by considering the effect the evidence or argument had or would have had upon the trier of fact. Errors which go to the very heart of the system are traditionally not subjected to harmless error as they are fundamentally unfair and the effect of such errors is often not easily determined.

Due to the indeterminable nature of the harm caused by errors of this type, applying the rule of Strickland or Chapman would create a constitutional deprivation for which there is no remedy. As efforts to establish prejudice by a criminal

defendant would also involve interference with the attorney/client privilege, Bailey v. Redmond, 657 F.2d 21, 24 (3rd Cir. 1981) cert. denied, 454 U.S. 1153 (1982); Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir., 1986), degradation of the criminal justice system would result.

ARGUMENT

APPLICATION OF THE STRICKLAND V. WASHINGTON PREJUDICE TEST TO DENIAL OF COUNSEL AT TRIAL IS FUNDAMENTALLY UNFAIR.

A. There Is No Rational Basis For Differentiating Between The Effect Of Denial Of Counsel In An Overnight Recess And A Routine Trial Day Recess.

The analysis used by the Circuit Court in determining harmlessness would be equally applicable to any case regardless of the length of denial. While recognizing

that overnight restriction would be presumed to be prejudicial under Geders v. United States, 425 U.S. 80 (1976), the opinion below found no prejudice in this case by considering factors such as the quality of Petitioner's representation; whether Petitioner received a "fair trial" in all other areas; Petitioner's performance upon cross-examination; the nature of the evidence against the Petitioner; the existence of other recesses in which Petitioner could consult; and the absence of other "colorable assignment of error." Such factors would be applicable to any situation in which there was denial of counsel regardless of duration. The duration of the recess is the only distinction between this case and the situation in Geders.

The distinctions drawn are artificial. Here, as in Geders, the recess was between direct and cross-examination.

The denial was as complete and without prior notice. The potential for prejudice in both instances is identical as the quality of the deprivation is not determined by its length. The inability to communicate is at issue, not whether it is overnight or for fifteen minutes. As pointed out by Chief Judge Winter in dissent, an overnight recess may "entail an effective deprivation of little more than the fifteen minutes at stake here...." (J.A. p. 43); 832 F.2d 837, 849 (1988).

The length of the recess has little or nothing to do with the issue of prejudice. The issue is whether the criminal defendant would have consulted with counsel. If he or she would have, then there is presumed prejudice requiring reversal.

B. The Use Of The Strickland v. Washington Outcome Determinative Test For Prejudice Places An Insurmountable Burden Upon The Criminal Defendant.

Applying the Strickland v. Washington test for prejudice would require the criminal defendant to establish that the constitutional error undermines "reliance on the outcome" of the trial. This outcome-determinative test would in effect create a presumption of harmlessness as few criminal defendants can demonstrate what might have been discussed had consultations been allowed or how such discussions would have affected the outcome. The benefit of the "guiding hand" aspect of counsel is even more nebulus.

Former Justice Harlan, dissenting in Chapman v. California, 386 U.S. 18 (1967), found that there are some constitutional errors which traditionally are not subject to harmless error and which

"seem to me essential to the fundamental fairness guaranteed by the due process clause..." Chapman at 52, n. 7. He found this principle to be well established by precedent of this Court and stated:

> The first is a recognition that particular types of error have an effect which is sc devastating or inherently indeterminate that as a matter law they cannot be found to be harmless... I would see violations of Gideon v. Wainwright, 372 U.S. 510, as falling in the first category.... Id.

The order of the trial judge, isolating the Petitioner from counsel, is by its nature "inherently indeterminate." The analysis below centered upon what occurred during the trial and not what effect consultation may have had. This is occasioned by the inability of a court to determine the effect of something which did not occur. Error in denial of counsel is

inappropriate for harmless error analysis for this very reason. See, Rose v. Clark, 106 S.Ct. 3101, 3107, n. 7 (1986).

C. This Court Has Traditionally Recognized That Denial Of Counsel Should Not Be Subjected To Harmless Error Analysis.

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States 315 U.S. 60, 76 (1942). The correctness of this proposition was endorsed in Chapman v. California, 386 U.S. 18 (1967), which recognized that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. Chapman identified three traditional areas where there was no prejudice inquiry:

coerced confessions, right to counsel, and impartial tribunal. Other errors of constitutional dimension may be subject to the "reasonable possibility that the evidence complained of might have contributed to the conviction" standard. Chapman at 24. The opinion below, by applying the Strickland standard, imposed upon the Petitioner a burden even greater than that espoused in Chapman.

Since this Court's decision in Chapman, there has been continued recognition that the denial of counsel at trial is one of several errors "so fundamental and persuasive that they require reversal without regard to the facts and circumstances of a particular case." Delaware v. Van Arsdale, 106 S.Ct. 1431, 1437 (1986); see also, Strickland v. Washington, 466 U.S. at 692; U.S. v. Cronic, 466 U.S. 648, 659 n. 25 (1986); Rose v. Clark, 106 S.Ct. 3101, 3106 n. 6

(1986); United States v. Hastings, 461 U.S. 499, 508, n. 6 (1982). There has been consistent recognition of the per se nature of such violations as they involve principles fundamental to our legal system. As the right to counsel at trial is in this category the duration of a deprivation of the right does not change the nature of the error. Any conviction obtained in violation of this principle is tainted.

D. Requiring A Criminal Defendant To Demonstrate Prejudice Will Necessarily Interfere With The Attorney Client Relationship.

The majority opinion below acknowledged there is a potential for interference with the attorney/client relationship by requiring a showing of prejudice. The opinion offered no solution to this problem as the majority found "the clear absence of prejudice has obviated the

need for any inquiry into that relationship." (J.A. p. 34); 832 F.2d 837, 844, n. 3. Further, the opinion asserts that a similar dilemma is posed by the prejudice inquiry of Strickland and Cronic. Id..

Ineffective assistance of counsel claims necessarily require inquiry into attorney/client discussions and the criminal defendant, by challenging the conduct of his counsel, waives the privilege for the purposes of the allegations. The Court in Strickland addressed the dangers of intrusive, post-trial inquiry in the context of a "second trial, this one of counsel's unsuccessful defense." 466 U.S. at 690.

The inquiry in this case is of a wholly different nature. There is no asserted deficiency on the part of counsel, the error is that of the trial court. It is clear there is no waiver of attorney/client privilege yet "private

discussions between counsel and client could be exposed in order to let the Government show that the accused's Sixth Amendment rights were not violated" Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986), see also, Bailey v. Redmond, 657 F.2d 21, 24 (3rd Cir. 1981). The adoption of a prejudice inquiry rule in this context would in most cases allow intrusion into the sanctity of attorney/client privilege. Such intrusion would occur even though neither the criminal defendant nor his counsel had invited or caused the error.

This Court has never advocated that a criminal defendant must forego one fundamental right in order to be accorded the guarantees of our constitution. The summary fashion in which this issue was resolved below does injustice to both this Petitioner and the sanctity of the principle.

Another serious problem of delving into private discussions between counsel and defendant to determine prejudice would be the potential that it would involve disclosure of trial strategies. Certainly, this would be critical if the deprivation is found to be prejudicial and a retrial is required. Much of the communication between a criminal defense attorney and his client is of a sensitive nature dealing with the defenses to be presented. The disclosure of such communications would not only inhibit the close communication necessary in this relationship but would leave the spectrum of disclosure of such communications open to use by the Government in subsequent trials.

E. Reliance On The Evidence Against Petitioner And Petitioner's Performance On Cross-Examination To Support The Decision Of The Court Below Demonstrates The Danger Of Applying Harmless Error Analysis.

There was substantial evidence presented to the trial jury that Petitioner was an unwilling participant in the murder of Dr. Heimberger. (supra pp. 6 - 13). This evidence came both from Petitioner's testimony and from independent scientific, circumstantial, and eyewitness testimony. The Petitioner's trial testimony was substantially similar to that which was first disclosed while under the influence of sodium amytal, (Tr. pp. 1013 - 1014), and there was expert testimony presented that at the time of the Petitioner's "confession" he was suffering from amnesia.

The determination that "the evidence against Perry was overwhelming" (J.A. p. 32), 832 F.2d at 843, is simply

unsupported by the evidence in this case.

The finding that Petitioner "took full advantage of his rights on cross-examination..." (J.A. p. 31), 832 F.2d at 843, is apparently based upon the majority's opinion that "Perry was anything but a passive witness on cross-examination." (J.A. p. 31), 832 F.2d at 843 n. 2. The argumentative nature of many of Petitioner's responses would support this finding. Being argumentative or nonresponsive to prosecution questions, however, does not comply with commonly accepted rules for testimony by a criminal defendant.

During his cross-examination, the Petitioner failed to respond at all to the fifth question asked by the prosecutor, (Tr. p. 774, ll. 17-18), and his failure to properly respond to other questions caused the trial judge to admonish him before the trial jury. (Tr. p. 784, ll. 17-25). The

commonly accepted instruction given by counsel to a testifying defendant is to answer the question asked and then, if necessary, explain. The defendant should never argue with the prosecutor.

Mr. Perry's low mental capabilities and fragile emotional state required the "guiding hand" of counsel at this critical point. Petitioner's defense hinged upon his ability to convince the jury of the truthfulness of his testimony and his inability to resist the threats of Deloach. The extended, direct examination necessitated a reminder as to the principles of cross-examination as well as reassurance to the Petitioner prior to being subjected to the prosecutor's attack. Being confined during this critical break without contact with any ally would have tended to increase Mr. Perry's anxiety and further reduce his abilities to effectively deal with cross-examination.

A criminal defendant's performance and demeanor while under cross-examination demonstrates for the trial jury the nature of his character and issues of credibility and guilt are often determined intuitively during this process. The ability to deal with cross-examination in a manner consistent with the defense likewise may be subtle in nature but upon such subtleties guilt or innocence is often determined.

The Circuit Court's conclusory determination of harmlessness ignores the substantial factual issues presented in this case and demonstrates the heavy burden that would be placed upon a criminal defendant to successfully prove prejudice. The Circuit Court recognizes the significance of an error of constitutional dimension but fails to provide a proper remedy for which the wrong may be redressed.

F. Fundamental Fairness Has A Broader Meaning Than Just The Reliability Of A Verdict.

This Court has long recognized that while the reliability or correctness of a verdict in a criminal case is of importance, the concept of "fundamental fairness" is larger in scope. There are certain basic tenets of justice which apply not only to fairness in an individual case but also to the totality of our criminal justice system.

Fundamental fairness lies at the heart of the Due Process Clause of the Fifth and Fourteenth Amendments. It involves "those fundamental notions of fairness and justice in the determination of guilt or innocence which lie imbedded in the feelings of the American people...." Haley v. Ohio, 332 U.S. 596, 607 (1948) (Frankfurter, Justice, concurring). To

adopt an outcome determinative test for this concept would tend to debase the principle sought to be protected.

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Lisenba v. California, 314 U.S. 219, 236 (1941).

It was found in Lisenba that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Id..

Justice Roberts, the author of Lisenba, earlier made it clear that an outcome determinative test for due process violations was improper.

> [W]here the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, though the result is just, if the hearing was unfair. Snyder v. Massachusetts, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting).

While outcome-determinative factors are important in many analyses of harmless error, they should remain as only one area of inquiry and not be solely determinative. There are certain errors so basic to our concept of justice that the use of outcome-determinative tests assaults the inherent fairness embodied in the system. Denial of counsel during trial is recognized as such error. The opinion below, however, relegates this fundamental

right to that of an "imperfection" which often occurs during trial. (J.A. p. 34); 832 F.2d at 845. To so denigrate this principle "which lies at the foundation of our system of criminal justice" threatens the American concept of justice. (App. p. 46, 832 F.2d at 850).

CONCLUSION

For the foregoing reasons, the Petitioner submits that the judgment of the Court of Appeals for the Fourth Judicial Circuit should be reversed and Petitioner's Writ of Habeas Corpus granted.

RESPECTFULLY SUBMITTED, this the 12th day of May, 1988, in Columbia, South Carolina.

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No. 87-6325

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DONALD RAY PERRY,

Petitioner,

versus

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE HARMLESS ERROR ANALYSIS WHERE THE RECORD REVEALS THAT THERE WAS NO PREJUDICE FROM ONE BRIEF SEQUESTRATION OF THE PETITIONER FROM HIS COUNSEL DURING A NON-ROUTINE BREAK BETWEEN HIS DIRECT AND CROSS - EXAMINATION?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This matter arises from a petition for a writ of habeas corpus filed by South Carolina inmate Donald Ray Perry. The Petitioner was convicted on October 3, 1981, in Richland County, South Carolina, for murder, kidnapping, and

criminal sexual conduct in the first degree, and is presently serving a sentence of life imprisonment for murder and thirty (30) years for criminal sexual conduct. He sought the writ of habeas corpus on the ground that he was not permitted to confer with counsel during a fifteen-minute trial recess between direct and cross - examination. The Court of Appeals, en banc, held that because any error at the state trial did not prejudice Perry under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), it reversed the judgment of the federal district court and remanded with instructions to dismiss the petition. (J.A. p. 21).

On March 5, 1981, Dr. Mary Heimberger had dinner with two friends in Richland County, South Carolina. After having dinner, she left alone in her own automobile. (Tr. pp. 3-6). Dr.

Heimberger's associates became alarmed the next day when she failed to report for work. (Tr. pp. 11-21, 31-36). Police officers were notified and began a preliminary investigation of her disappearance. (Tr. pp. 108-111).

Two young boys found her body on March 7, 1981, in a wooded area and notified the authorities. (Tr. pp. 157-158, 162, 164). Donald Ray Perry's fingerprint was later found on Heimberger's car; tire tracks from Perry's car were found on the scene, as were prints of Perry's shoes. After police arrested Perry, he confessed that he had shot Heimberger, but said it was an accident.

A medical examination of Heimberger's body indicated that someone had raped her, attempted to strangle her, shot her in both kneecaps, and then shot her fatally in the chest. The

entrance to her vagina had been bruised and torn. Following her death, she was subjected to further post-mortem abuse.

Donald Ray Perry was indicted during the August, 1981, term of the Court of General Sessions for Richland County for the offenses of murder, kidnapping, and criminal sexual conduct in the first degree. (Tr. pp. iii-viii). The Solicitor of the Fifth Judicial Circuit, the Honorable James C. Anders, gave timely notice to the Petitioner of his intention to seek the death penalty in accordance with South Carolina law. Further, W. Gaston Fairey (present counsel before this Court), and Edward Mullineaux were appointed by the trial court to represent Mr. Perry in his trial.

On September 21, 1981, the trial commenced in Richland County before the Honorable Julius H. Baggett, Circuit

Judge of South Carolina. Eight (8) days later, a short recess was held during the Petitioner's testimony that is the primary subject to his appeal. (J.A. pp. 3-5). On October 2, 1981, the jury found the Petitioner guilty of murder, kidnapping, and criminal sexual conduct.

Pursuant to the South Carolina Death Penalty Act, a bifurcated sentencing proceeding was held. After further testimony was introduced by the defense (Tr. pp. 1196-1212), the jury recommended a sentence of life imprisonment for murder rather than the death penalty. On October 5, 1981, Judge Baggett sentenced the Petitioner to life imprisonment for murder, life imprisonment consecutive for kidnapping, and thirty (30) years consecutive for criminal sexual conduct in the first degree.

The Petitioner timely filed a notice of intention to appeal to the South Carolina Supreme Court on October 12, 1981. The Petitioner was represented in the appeal by David W. Carpenter of the South Carolina Commission on Appellate Defense, as well as his trial counsel. Among others, the Petitioner raised the following as an exception:

> I. The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

(Tr. p. 1346). On January 3, 1983, the South Carolina Supreme Court issued its opinion, written by Associate Justice Littlejohn, upholding the conviction and rejecting the argument of the Petitioner. State v. Perry, 278 S.C.

490, 299 S.E.2d 324 (1983). (J.A. pp. 8-16). The Petitioner made a petition for certiorari to the United States Supreme Court on this same issue. On April 25, 1983, the Court issued its order denying the petition for certiorari. Donald Ray Perry v. South Carolina, No. 82-6336, 461 U.S. 908, 103 S.Ct. 1881, 76 L.Ed.2d 811 (1983).

On November 11, 1985, the Petitioner, with the assistance of present counsel, made a petition for writ of habeas corpus in the federal district court contending that he was denied the effective assistance of counsel between the Petitioner's direct and cross-examination at trial when the Court ordered that he was not to confer with counsel during a fifteen-minute break in the court proceedings. (A. p. 5). On May 29, 1986, the Honorable Robert S. Carr issued his report and

recommendation that the writ [of habeas corpus] issue unless the State [of South Carolina] elects to retry the Petitioner within a reasonable period of time." (A. p. 21). In his report, Magistrate Carr opined that he was bound by the decision in U.S. v. Allen, 542 F.2d 630 (4th Cir. 1976), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982) of the Court of Appeals. The Respondents made written objections to various factual findings of the report. (A. p. 22). On June 26, 1986, the Honorable C. Weston Houck issued his order rejecting the objections of the Respondents and conditionally ordering that the writ of habeas corpus shall issue. (J.A. pp. 17-19).

On November 5, 1987, the United States Court of Appeals for the Fourth Circuit, sitting en banc, reversed the judgment of the District Court and

remanded the case with directions that the Petition be dismissed. In its decision, authored by Judge Wilkinson, the Court held that Perry was not entitled to the requested relief because, under the unique facts of the case, prejudice was not shown under the standard enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). (J.A. p. 21). In particular, it held that there was no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross - examination. (J.A. p. 31). Further, the Court stated that "there is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior

to his taking the witness stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course necessary." (J.A. p. 31). The Court also noted the testimony against Perry as being overwhelming and the representation of his counsel team as being vigorous. (J.A. pp. 32, 33). It concluded that these factors persuaded the Court "that the possibility of prejudice is utterly remote." (J.A. p. 33). Therein, it concluded that his request for relief was without merit.

The critical issue in this case concerns whether a brief recess between the direct and cross-examination during which counsel was denied access to his client entitles him to a new trial. The record before this Court reveals that the trial began with pre-trial motions

and jury selection on September 21, 1981, and concluded on October 5, 1981. During this lengthy trial, the record reveals that there were eleven recesses during the testimony portion of the trial prior to the Petitioner's testimony on September 29, 1981. (Tr. pp. 86, 176, 213, 274, 344, 352, 421, 470, 517, 585, 663). Included in these recesses were an overnight recess from September 25-26, 1981 (Tr. p. 176), a weekend recess from September 26-28, 1981 (Tr. p. 352), and an overnight recess from September 28-29, 1981 (Tr. p. 585). Of critical importance, there was a luncheon recess just prior to the Petitioner's testimony on September 29, 1981. It is uncontested that there was no restriction on counsel's access to his client during this entire period.

On September 29, 1981, the Petitioner was called to testify. (A.

pp. 34-191). He was the third witness called by the defense. His testimony began immediately after a luncheon recess where his access to counsel was unrestricted. (A. p. 34). During his direct testimony, a brief recess was held at the request of a juror. (A. p. 76). It is uncontested that counsel had access to his client during this recess. (J.A. p. 28).

After counsel completed his direct examination of the Petitioner, a recess was ordered for fifteen minutes. (A. p. 142). After the recess was concluded, trial counsel made the following motion to the Court:

> Mr. Fairey: Your Honor, we have an additional motion for a mistrial on the grounds that we are being denied -- Mr. Perry is being denied adequate representation of counsel because I understand the Court has ordered the attorneys not to speak with him during this break.
>
> The Court: During the last break, that is true. Mr. Perry has

testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied.

Mr. Fairey: I would like the record to also reflect that such instructions have not been made for any other witness in this trial.

The Court: That is correct. I'm not sure that situation has arisen up to this point in time.

Mr. Fairey: I would also --

The Court: And which it would not matter because no one is on trial but Mr. Perry and that motion would not apply. The Sixth Amendment rights apply only to one who is on trial.

Mr. Fairey: I agree with you. But I would like the record to reflect that this is the only instance during the trial that this has been done and in several cases there have been breaks between direct and cross-examination.

The Court: I'm not sure. I recall one other instance but I can't say exactly what it was. But your motion is noted, sir, and it is denied.

(J.A. pp. 4-5). The Petitioner completed his testimony that afternoon. (A. p. 190)

Immediately after his testimony, an overnight recess was held during w...ch time the Petitioner had access to counsel. (A. pp. 190-191). The record reflects that the defense further presented seventeen (17) additional witnesses during the guilt phase portion of his trial. (Tr. pp. 820-1135). During the presentation of these witnesses, the following recesses occurred in which counsel's access to his client was not restricted: the overnight recess at the conclusion of Mr. Perry's examination (A. p. 190), a fifteen-minute recess on September 30, 1981, at the conclusion of Miriam Perry's direct testimony (A. p. 192), a lunch recess at the conclusion of Miriam Perry's testimony (A. p. 194), a brief

recess at the conclusion of John Shupper's testimony (A. p. 195), an overnight recess at the conclusion of Dr. Follingstad's testimony to October 1, 1981 (A. p. 196), a brief recess for fifteen minutes at the conclusion of Dr. Morgan's testimony on October 31, 1981, at the request of counsel Fairey (A. p. 197). On October 1, 1981, the defense rested its case. (Tr. p. 1135).

During the reply testimony, there was also a brief recess waiting for a witness (Tr. p. 1158), and a lunch recess (A. p. 199). On October 1, 1981, the testimony was completed and the defense made its motions. (Tr. p. 1182). At the conclusion of these motions, there was an evening recess until the morning of October 2, 1981. (A. p. 201). After the arguments, charges, and deliberations had begun, an evening recess was held until October 3,

1981 (Tr. p. 1336).

On Saturday, October 3, 1981, the jury returned its verdict at 3:12 P.M. The jury convicted the Petitioner of murder, kidnapping, and criminal sexual conduct. (Tr. p. 1337). The jury was polled and advised that the penalty phase would begin Monday, October 5, 1981. (A. p. 202). Counsel for the Petitioner moved for a judgment n.o.v., or new trial, "based upon our lack of being able to have access to the defendant during the break taken during the Court proceedings." (A. p. 204). Pertinent inquiry was as follows:

> The Court: I don't think it's necessary. 1 will state for the record as a stipulated matter if you care to that Mr. Mullineaux did attempt to talk to the defendant during the break and he was not allowed to because of the order that I issued.
>
> Mr. Fairey: I would also like to put on the record that we were not notified as to the order prior to the order being issued. We didn't

learn of that until we attempted to talk to the defendant.

The Court: True.

Mr. Fairey: We'd also like the Court to acknowledge that we would not have tried to do anything improper with the defendant.

The Court: I'm quick to acknowledge that. No question about that.

Mr. Fairey: Yes, sir, and other than answer his questions and also to make sure he understood his rights on cross-examination.

The Court: I'm sure you gentlemen realize why I did it. Well, I don't mean for you to acknowledge it. I've already stated why I did it so you have that on the record. That's all right.

(J.A. pp. 6-7). The penalty phase testimony was begun on October 5, 1981. The Petitioner presented six (6) witnesses in mitigation of punishment. Counsel further pointed out to the Court eighteen (18) witnesses who had agreed to come to court and would have presented similar mitigation evidence.

(Tr. p. 1213). After jury charges, the jury issued its recommendation of life imprisonment for murder. The trial court then sentenced the Petitioner to thirty (30) years imprisonment for criminal sexual conduct, life for kidnapping, and life for murder, consecutive to each other. The sentence for kidnapping was vacated on state law grounds on appeal, while the conviction was affirmed.

SUMMARY OF ARGUMENT

The right to counsel is a fundamental right of criminal defendants. The right to counsel is the right to the effective assistance of counsel. It is a right to ensure true adversarial testing of the prosecution case and relates to the truth-furthering process.

An order of sequestration of the defendant during a brief fifteen-minute

recess is distinguishable from a sequestration for an overnight recess on the basis of the Sixth Amendment. This is especially true where the recess was unscheduled and it was not a time when counsel normally confers with the defendant. Under these circumstances, his right to the assistance of counsel was not impinged.

Since the Sixth Amendment concerns can be met, the review should not be subject to the per se reversal rule, but rather a review to determine if the trial was fair and reliable. Under the particular facts of this case, automatic reversal is not appropriate where the record reveals able representation by counsel and numerous recesses that allowed for adequate and diligent preparation at all times consultation normally occurs.

The record further reveals no prejudice to the defendant arising from the brief ban on consultation. Clearly, the result in the case was reliable and the trial was fundamentally fair.

ARGUMENT

The right to counsel is, without question, a fundamental right of criminal defendants. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." It is within the Sixth Amendment which recognized the right to counsel that the basic elements of the fair trial guaranteed by the Fourteenth Amendment are defined. Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel

plays a critical role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. Strickland v. Washington, 466 U.S. 668, 685 (1984). That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

The Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); Strickland v. Washington, supra, 466 U.S. at 689. U.S. v. Cronic, 466 U.S. 648, 654 (1984).

In Cronic, supra, the Court recognized the special value of the right to the assistance of counsel. It stated "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Cronic, supra, 466 U.S. at 654. The core purpose of the counsel guarantee was to assure assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. Id. The very premise of our adversary

system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Id. at 656, citing Herring v. New York, 422 U.S. 853, 862 (1975).

The right to counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred. Cronic, supra. In Herring v. New York, supra, the Court held that a defendant's Sixth Amendment right to counsel was violated by a statute under which the trial court could refuse to permit a closing argument in a bench trial. Therein, the Court reasoned that a final summation by

counsel was as basic an element of the adversarial process as a jury trial. In Brooks v. Tennessee, 406 U.S. 605 (1972), a statute requiring the defendant to testify as the first defense witness or not at all was held to deny due process by depriving the defendant of the "guiding hand of counsel" in the timing of this critical element of his defense. In Ferguson v. Georgia, 365 U.S. 570 (1961), a statute which allowed the defendant to make an unsworn statement but denied direct examination by his counsel was held to violate due process. Error was found in Davis v. Alaska, 415 U.S. 308 (1974), where a defendant was denied the right of confrontation under the Sixth Amendment to a full cross-examination by a state statute that barred use of a juvenile record to impeach an important state witness.

Obviously, the complete denial of counsel has been previously presumed to result in prejudice when it occurred at a critical stage, such as at an arraignment where a failure to raise a defense would amount to a waiver. Hamilton v. Alabama, 368 U.S. 52 (1961). Similarly, the Sixth Amendment right to counsel was held to apply where the defendant was asked to enter a non-binding plea which would be used at trial. White v. Maryland, 373 U.S. 59 (1963).

Each of the above situations related directly to the truth-furthering process as it relates to the Sixth Amendment right to counsel. In Strickland, supra, 466 U.S. at 692, the Court stated that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the costs." Similarly, the

Court in Cronic, supra, 466 U.S. at 659-660, stated "circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

One of the circumstances cited for presumed prejudice was in Geders v. U.S., 425 U.S. 80 (1976). Geders held that a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his attorney during a seventeen (17) hour overnight recess. In its opinion, the Court emphasized the importance of the recess.

> It is common practice during such recess for the accused and counsel

> to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Geders, 425 U.S. at 88. In its opinion, the Court emphasized alternative ways to deal with the problem of "coaching" short of putting a barrier for so long a period as seventeen hours, including a direction that the examination of the witness continue without interruption. Id. at 90. More importantly, it stated:

> If the judge considers the risks high he may arrange the sequence of testimony so that the direct and cross-examination of a witness will be completed without interruption. That this would not be feasible in

> some cases due to the length of direct and cross-examination does not alter the availability, in most cases of a solution that does not cut off communication for so long a period as presented by this record ....

Id. at 90-91. The Court concluded that "the challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel." Id. While specifically not reaching other limitations, it held that "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." Id.

> A. A brief non-scheduled recess during the trial day is distinguishable from the lengthy overnight recess from a Sixth Amendment viewpoint.

The Petitioner contends that he is entitled to automatic reversal because the situation presented in Geders and the instant case are not distinguishable. We disagree. Two critical issues were presented in Geders that are not presented here. In Geders, the court was faced with an order that precluded consultation between a defendant and counsel for an extreme duration of seventeen hours overnight. Most importantly, the court in Geders emphasized that this period was a time when counsel and the defendant expected to confer and normally confer. Geders, 425 U.S. at 90-91. By dramatic contrast, the situation here was a brief recess which was unscheduled and not a time when counsel and the Petitioner expected to confer or normally confer about strategies and the day's events. Particularly illustrative of this

difference was trial counsel's statement to the Court that he wanted "to make sure he understood his rights on cross-examination." (J.A. p. 7). As the Court of Appeals held, there is no entitlement to a recess at that time and no reason to expect one. (J.A. pp. 23, 29). As stated in Geders, in a majority of instances, cross-examination follows direct examination without a break. Id. at 90. The court below noted that there was no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess immediately prior to his taking the stand. (J.A. p. 31).

It is clear that the Court's emphasis in Geders was that to have sequestered counsel from the defendant for this lengthy period could have

affected the truth furthering process because it was at a time that normal consultation, review of strategy, and development of information usually occurred. To accept the logical extension of the Petitioner's argument would lead to a Sixth Amendment right to consult with a client between direct and cross-examination. A trial court is not required to interrupt trial proceedings whenever a defendant and his attorney express a desire to confer. The logic of Geders is that it is proper for a trial judge to direct that the examination of a witness continues without interruption until completed to avoid the possibility of coaching. Clearly then, the instant situation which allowed Petitioner to consult with counsel at all times they would normally confer or expect to confer, such as luncheon recess, or overnight recess

does not present the same type of deprivation presented in Geders. The truth-furthering process enunciated in the Sixth Amendment was not affected by the restriction over the brief recess than it would have been by the continuation of the examination. Clearly then, the length of time present in Geders and this case is constitutionally significant. We submit that the order preventing counsel from consulting with his client during the fifteen-minute recess did not impinge on his Sixth Amendment right to the assistance of counsel.

B. Under these circumstances the rule of automatic reversal should not apply because a review of the record can determine whether the trial was fundamentally fair and the result reliable.

Respondents submit that the brief sequestration should not be subject to

the per se reversal rule of Geders, supra, but should be more appropriately subjected to the test of prejudice set forth in Strickland v. Washington, 466 U.S. 668 (1984). A per se rule of reversal is "the exception and not the rule" under any circumstances. Rose v. Clark, 478 U.S.__, 106 S.Ct. 3103, 3106 (1986). Under the factual situation presented here, the per se analysis would be inappropriate because it is relatively easy for courts to evaluate the possible impact of the order on the outcome. Stacy and Drayton, Rethinking Harmless Constitutional Error, 88 Columbia L.Rev. 79, 107-110 (1988).

Under Strickland, this Court acknowledges that the focus of the Sixth Amendment right to counsel is "meant to assure fairness in the adversary criminal process." Strickland, 466 U.S. at 656. The ultimate focus of the

inquiry concerning alleged deprivations of the right to counsel "must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Since the right to counsel is designed to promote the reliability of the verdict, harmless error analysis is an appropriate remedy unless it is inherently difficult to show that a violation of the right affected the outcome. In Cronic, the Court stated that when there was a complete denial of counsel and in situations when circumstances were present that even when counsel is available to assist, the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice was appropriate without inquiry into the conduct of the trial. Cronic, supra, 466 U.S. at 659-660. Stated another way, prejudice

is presumed in situations "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658.

Since the purpose of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," the circumstances surrounding the ordered sequestration must be reviewed to determine if it is a circumstance that prejudice should be presumed. In Cronic and Strickland, the defendants contended that they have been denied their Sixth Amendment rights because they had been represented by incompetent counsel. Those situations could present circumstances when available counsel failed to timely advise his client of his rights on cross-examination, prepare defense witnesses, or generally prepare a

defense. Such a deprivation is more likely to have a prejudicial effect that the deprivation at issue here. In the instant case, consultation was allowed during the normal overnight and luncheon recesses immediately prior to his testimony. As the Court of Appeals held, "it would make little sense to maintain a per se rule of reversal for a brief restriction on consultation, but to inquire into prejudice only when Perry had been represented incompetently throughout." (J.A. p. 27). Similarly, if counsel neglected and failed to discuss or meet with his client during the recess upon client's request, the entire proceedings would be inquired into to determine the existence of prejudice.

This is not the type of error that the Court should characterize as "so devastating or inherently indeterminate"

that as a matter of law cannot be found to be harmless. Chapman v. California, 386 U.S. 18, 52, n. 7, (1967) (Harlan, J., dissenting). The Court previously acknowledged those unique situations in the right to counsel area where the interferences pose such a fundamental threat to a fair trial that prejudice is presumed. Cronic, 466 U.S. at 658-59 (1984); Strickland, 466 U.S. at 692. The existence of prejudice from a brief restriction such as this one is necessarily tied to the facts and should not be presumed to have infected the entire trial that no course other than reversal of the conviction is conceivable.

The instant situation is one in which, even with the brief recess restriction, the circumstances were not so likely to prejudice the accused that the cost of litigating their effect was

unjustified. He was represented by two strong advocates in his capital murder trial. Twenty-seven witnesses were presented by the defense. Cross - examination of the state's witnesses was found to be vigorous. It was a lengthy trial with eleven different recesses prior to his testimony, including two overnight recesses, one weekend recess, a luncheon recess immediately before his testimony, and one unrestricted break during his direct examination. Subsequent to his testimony, there were two overnight recesses and five brief recesses during the guilt phase of the case. Other recesses during the penalty phase of the trial were also held and the Petitioner presented numerous witnesses to the Court. Clearly, the situation allowed for a "reliable" verdict and a fundamentally fair trial. Depriving the Petitioner of consultation

during a brief recess when the recess was not expected or "normal" did not deprive the Petitioner of his Sixth Amendment right to the assistance of counsel. To reverse automatically a conviction because of the absence of consultation during one brief, fortuitous recess in a trial which spanned two weeks would be to confer a benefit upon a defendant who may not deserve it. (J.A. p. 29). Since the Sixth Amendment is based upon a reliable and fundamentally fair trial, the inquiry should be whether the defendant suffered prejudice and whether the trial was fundamentally fair with the ability to produce a just result. Strickland, supra, 466 U.S. 696.

C. A review of the record reveals that there was no prejudice to the Petitioner as a result of the brief bar on consultation.

The record before the Court reveals that Perry did not suffer prejudice because of the sequestration order. The Court of Appeals relied upon the standard in Strickland as to whether the defendant received a "fair trial" as to which "evidence subject to an adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of trial." (J.A. p. 31). The Court of Appeals held that there can be no legitimate fear that the trial court's order jeopardized Perry's ability to receive a fair trial and no doubt that he received the assistance necessary to justify reliance on the outcome of his trial. (J.A. p. 31).

In Chapman v. California, 386 U.S. 18 (1967), the Court rejected the argument that errors of constitutional dimension necessarily require reversal

of criminal convictions. Since Chapman, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. Rose v. Clark, supra, 106 S.Ct. 3105; Delaware v. Van Arsdale, 475 U.S.__, 106 S.Ct. 1431, 1436 (1986). The standard of review applied in the instant case clearly met the Chapman standard that "there can be no doubt that Perry received the assistance necessary to justify reliance on the outcome of his trial." (J.A. p. 31). Here, there was not the type of error that aborted the basic trial process, such as the use of a coerced confession or denied it altogether by complete denial of counsel or a biased judge, which cannot be held harmless.

Rose, supra, 106 S.Ct. 3106. As stated in Rose, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. Id. at 3107. Here, the test properly determined whether the interest in fairness has been satisfied and a reliable verdict has been presented. Contrary to the posture the Petitioner presents, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Van Arsdale, supra, 106 S.Ct. at 1436.

The Petitioner urges this Court that to adopt the analysis of the Court of Appeals would interfere unnecessarily with the attorney-client relationship. This Court has previously held that a defendant may be forced to reveal

privileged communications to establish that his attorney was constitutionally ineffective under Strickland, or performed under an actual conflict of interest as in Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, trial counsel proffered his desire to consult to discuss with him his rights on cross - examination. (J.A. p. 7). The Court of Appeals held that the total absence of prejudice made it unnecessary to address the issue of revealing confidences. (J.A. p. 34, n. 3). The issue therefore is not before the Court under these facts.

A review of the entire record reveals that the alleged error was harmless beyond a reasonable doubt to the reliability of the verdict. The Court of Appeals determined that the evidence of guilt was overwhelming. (J.A. pp. 32-33). The state evidence

revealed that his car was at the murder scene, his footprints were at the scene, and his fingerprints were on the victim's car. At one point, Perry admitted to shooting Dr. Heimberger, but contended it was an accident. Later he admitted to having sexual relations with the victim without her consent, but claimed it was under duress. A reliable and adversarial trial was held because the Petitioner took full advantage of his rights on cross-examination in placing his version of the events before the jury. (J.A. p. 31, n. 2).

The Petitioner now contends that the extended direct examination "necessitated a reminder as to the principles of cross-examination as well as reassurance to the Petitioner prior to being subjected to the prosecutor's attack." Further, he asserts that the brief sequestration likely increased the

Petitioner's anxiety and reduced his ability to deal with cross-examination. This position wholly ignores the suggestion of Geders to proceed completely through examination to avoid the prospect of coaching. Geders, supra, 425 U.S. at 90-91. The reliability of the verdict and the truth-furthering role of counsel under the Sixth Amendment were met during the trial.

D. The trial resulted in a just and reliable verdict.

In summary, the Petitioner's trial may not have been a perfect one, but it was a fair trial that resulted in a just and reliable verdict. Under our system of justice, the role of the trial is to determine the truth by the procedures it establishes. Where a reviewing court is able to say on the basis of the record developed at trial that the interest in

fairness has been satisfied and the possibility of prejudice from the alleged defect is "utterly remote," (J.A. p. 33), the judgment of conviction should be affirmed. Those requirements under the Sixth Amendment have been met.

CONCLUSION

For all the foregoing reasons, the Respondents request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

JAMES C. ANDERS
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

June 29, 1988
Columbia, South Carolina

47

No. 87-6325

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DONALD RAY PERRY,

Petitioner,

versus

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief for Respondents in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 29th day of June, 1988.

Donald J. Zelenka

SWORN to before me this
28th day of June, 1988.

Kathy L. Wilder (LS)
Notary Public for South Carolina
My Commission Expires: 2-18-91.

No. 87-6325

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief for Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to W. Gaston Fairey, Esquire, P. O. Box 8443, Columbia, South Carolina 29202. He further certifies that all parties required to be served have been served.

This 29th day of June, 1988.

Donald J. Zelenka

SWORN to before me this
29th day of June, 1988.

Kathy L Wilkes (LS)
Notary Public for South Carolina
My Commission Expires: 3-18-91.

(7)

No. 87-6325

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November Term, 1987

DONALD RAY PERRY,

PETITIONER,

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WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief of the National Association Of Criminal Defense Lawyers As Amicus Curiae Supporting Respondent

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For Amicus Curiae
National Association
of Criminal Defense
Lawyers

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5000 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law,

its practices and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional right to counsel as provided by the Sixth Amendment. The NACDL is very concerned about any decision that would undermine this constitutional right, as would adoption of the position taken by Respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief: W. Gaston Fairey on behalf of Petitioner, Donald Ray Perry and Chief Deputy Attorney General Donald J. Zelenka

on behalf of William D. Leeke, Commissioner, South Carolina Department of Corrections and the Attorney General of South Carolina, Respondents. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

In finding that a fifteen minute denial of counsel did not violate the right to counsel guarantee of the Sixth Amendment, the Fourth Circuit failed to appreciate the nature of trial practice and the critical decisions which lawyers must make every day, often in a matter of seconds.

In particular, the Fourth Circuit failed to consider the important role that demeanor evidence plays in a jury's decision making process. How a defendant responds to cross-examination is often as important as his answers to an individual question, and without the advice of counsel, a defendant may well destroy his credibility by arguing with the prosecutor, glancing over to his lawyer before responding to a difficult question, failing to look the prosecutor in the

eye, or failing to listen carefully to the questions asked and volunteering information not requested.

Moreover, the Fourth Circuit erroneously held that it is improper for an attorney to discuss the substance of the client's testimony once the defendant has taken the stand, either on direct or cross. In fact, all that a lawyer is prohibited from doing is telling his client what to say. It is perfectly proper for the lawyer to go over with the defendant the questions he and his adversary will ask. It may even be necessary for defense counsel to interrupt cross-examination and ask to consult with the defendant where the prosecutor has asked the defendant to reveal matters covered by the attorney-client privilege or where the lawyer knows that the defendant has testified falsely.

A defendant could never establish what effect his arguing with the prosecutor had upon the jury. Nor could a defendant prove that he would not have presented false exculpatory testimony had he been permitted to consult with his lawyer before beginning his cross-examination. Plainly, the preclusion of counsel does not lend itself to harmless error analysis.

ARGUMENT

HARMLESS ERROR ANALYSIS IS NOT APPROPRIATE WHERE THERE IS A DENIAL OF COUNSEL DURING THE COURSE OF A CRIMINAL TRIAL

In Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987)(en banc), the majority held that whether an order not to confer with counsel is per se reversible error depends upon whether that order constitutes an outright denial of counsel or whether it merely interferes with effective assistance of counsel.

In finding that the order complained of herein fell into the latter category, the court focused upon the trial as a whole and the amount of time that defense counsel was able to confer with the defendant. Weighing the many hours counsel and defendant spent together against the few minutes that counsel and defendant were prevented from conferring,

the majority concluded that the order was at most an interference with effective assistance of counsel and not a denial of assistance of counsel.

We believe that the court's decision is based in part upon a fundamentally flawed premise: that it is both improper and unusual for a defense attorney to consult with the defendant about his testimony once the defendant has taken the stand. As the following discussion will demonstrate, not only is it often appropriate for counsel to consult with a testifying defendant but such consultation is sometimes required by the Canons of Ethics.

An order such as the one given herein could occur anytime during a trial. But it is most likely to occur just before the beginning of a defendant's cross examination. It is at this

time that trial courts seem most concerned that a defendant might be improperly coached.

But the only thing that would be improper for a defense attorney to do would be to tell the defendant what he should say when he takes the stand. Model Rules of Professional Conduct, 3.4 (1983). It would certainly not be improper for counsel to answer any question the defendant might have or to again go over with the defendant the prosecutor's likely line of attack.

Fundamentally, the majority's analysis is flawed because of its failure take into account the importance that the defendant's demeanor plays in the jury's verdict and the role that defense counsel has in insuring that the jury does not convict the defendant based or his looks or how he answers a question.

As any trial lawyer knows, how a defendant appears in the lawyer's office, or how the defendant performs when he is examined by his own attorney in private, is little indication of how he will act on the witness stand. As Melvin Belli observed in his treatise, Modern Trials, (1982):

> I have seen the "flattest" and most unglamorous prospective witness in my office, yet when once they sat themselves upon the witness chair, they became people or entirely different quality. Everyone who has tried a case, unfortunately has experienced the converse.

Id. 773.

No matter how many hours defense counsel has spent with the defendant: going over the defendant's testimony, subjecting the defendant to grueling cross-examination, instructing the defendant on how to behave on the stand, the defendant may forget everything once the

trial has begun. And it is only after the defendant has finished his direct examination that counsel knows whether there is a problem.

The defendant, told to speak loudly and clearly, did not. The defendant, told to listen to each question carefully before answering, did not. The defendant, instructed repeatedly not to cover his mouth and not to look down at the floor, did so. At the conclusion of the direct examination, counsel knows that the jury must doubt the defendant's testimony solely because of the way the defendant testified. P. McCloskey and R. Schoenberg, Criminal Law Advocacy, 4-53 to 54 (1988); Morrill, Trial Diplomacy 2d Ed., 35 (1985).

In a matter of seconds, counsel can correct any of these errors. And counsel can remind the defendant not to do other

things which would completely destroy his credibility with the jury. Consider the following statements whispered to the defendant just before cross-examination begins.

1 "Don't deny we discussed your testimony."

In his treatise on Trial Diplomacy, Alan Morrill notes that a truthful witness's testimony can be completely discredited by a denial that he discussed his testimony with his attorney. Moreover, "[i]t takes only a few seconds to explain to him that it is perfectly proper for an attorney to interview a witness and that it would be absurd not to do so." Id. at 36-37. Accord, Givens, Advocacy: The Art of Pleading a Cause, 150 (1980).

2. "Just answer the questions asked, don't volunteer anything."

Having seen the defendant's performance on direct examination, trial counsel may realize that the defendant is having trouble controlling his tongue. While counsel must advise his client to answer all questions truthfully and completely, the defendant is under no obligation to volunteer unsolicited information and it is that unsolicited information which may cause a jury to convict. Iannuzzi, Cross-Examination: The Mosaic Art, 102 (1982).

3. "Look at the prosecutor, don't look at me. If I have an objection, I'll stand up."

In their treatise, Criminal Law Advocacy, Patrick McCloskey and Ronald Schoenberg write:

> The worst thing the witness can do (other than showing complete disinterest or disrespect) is to look at the direct examiner in the midst of cross-examina--

> tion. If he looks at the direct examiner prior to answering a question, the witness will give the appearance that he has been coached by the direct examiner and is receiving answers from him.

Id. at 4-64.

4. "Quit looking at the floor, look the prosecutor in the eye."

To be able to make a statement and look the person you are addressing straight in the eye is thought by many to be a sign or truth-telling. And the failure to do so, the sign of a liar. There are many honest people, however, who find it very difficult to look directly at the person whom they are talking with. Unfortunately this difficulty can be devastating at trial. As Morrill points out in Trial Diplomacy:

> Invariably, there will be a number of jurors who will regard this as most significant. They have heard, and

> perhaps have been taught, that people who do not look them in the eye are liars. These same jurors may now regard it as their duty to identify the deceitful fellow and enlighten their fellow jurors at the first opportunity.

Id. at 35.

5. "Calm down and don't argue with the prosecutor."

There is universal agreement among trial lawyers that it is fatal for a defendant to argue with the prosecutor. As Richard Givens observed in his treatise, Advocacy: The Art of Pleading a Cause,:

> The greatest risk for the witness is to become involved with the personality of the examiner. To placate, retaliate against, try to convince, or attempt to argue with the examiner is a diversion from the one job the witness has: simply to answer the examiner's questions.

Id. at 130. And:

> A cross-examiner will sometimes deliberately bait a witness in the hope of eliciting anger, thus destroying the witness's credibility. Explaining this trap to the witness can enable the witness to avoid it.

Id. at 134. Indeed, "Angry witnesses are more prone to rash statements, hasty judgments, and ultimately error." Kestler, Questioning Techniques and Tactics, 346 (1982). Accord McCloskey and Schoenberg, supra at 4-64; Morrill, supra at 34.

In finding that a fifteen minute interference with counsel was not a denial of counsel, the court below failed to appreciate that the most significant advice given must sometimes be given in the shortest of time. If defense counsel cannot speak to the defendant, he cannot give this advice. Yet, as much as the content of the testimony, such advice may well influence the course of the trial,

for it is often not what a person says but how that person says it which makes the most significant impression.

The court below held that since there is no entitlement to a recess before cross-examination begins, any assistance counsel could give to the defendant is simply to speculative to justify a rule of automatic reversal. 832 F.2d at 842. To support this finding the court noted that "In a majority of instances, cross examination of a witness follows direct examination without a break," and "New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult." Id.

In fact, the kind of advice which is often imparted during the course of a trial does not require a formal break in

the proceedings. Any of the admonitions mentioned above could be imparted in under five seconds. Moreover, the court's assertion that in a majority of instances cross-examination follows direct examination without interruption is unsupported by anything in the record before this Court and is not supported by the decision cited, Geders v. United States, 425 U.S. 80, 90 (1976). Geders held only that a court could control coaching by directing cross-examination to begin immediately upon the completion of direct. Geders made no findings concerning the general practice in the court's of the United States.

Breaks frequently occur during the course of a trial and may happen before and during the cross-examination of the defendant, sometimes at the request of the state. While it is true that there is

no right to halt the proceedings in order to consult, in some circumstances counsel has an absolute duty to request a consultation with the defendant. The prosecutor may, for instance, ask a question of the defendant which could potentially invade the attorney-client privilege. The defendant must be able to consult with his attorney in order not to inadvertently waive the privilege.

Moreover, defense counsel has an obligation to insure that false or perjurious testimony not be presented to the jury. After hearing an answer by the defendant which the lawyer knows to be untrue, the lawyer must approach the bench to ask to speak with his client. Model Rules of Professional Conduct, 3.3 (1983). In such a conference the lawyer will remind the defendant of the necessity of telling the truth. The lawyer

might also attempt to convince the defendant that it is in his best interest to correct his answer now, since the prosecutor will likely destroy the case with rebuttal evidence later. Indeed, a timely correction by the defendant may save the day. As Kestler noted in Questioning Techniques and Tactics:

> Just as it is inevitable that the cross-examiner will score some points against the witness, it is also likely that the witness will make a mistake or two....The best rule to follow is that a mistake should be corrected immediately with a forthright admission of error.

Id. at 348.

As the dissent points out in Perry, the circumstances in which counsel may need to consult with the defendant are almost too numerous to mention. In addition to the advice which counsel may wish to impart to the defendant, counsel may have questions for the defendant

based upon his testimony during the direct or cross-examination. Counsel may have thought of a potentially helpful question for redirect that he could not risk asking without first knowing what the defendant's answer would be. Or damaging evidence may have been elicited during the prosecutor's cross-examination which counsel cannot deal with on re-direct without first getting an explanation from the defendant. 832 F.2 at 849.

As these examples demonstrate, the most significant events in the course of a trial happen, not during an overnight recess, when lawyers and litigants have time to reflect, but in the heat of battle, when decisions must be made in an instant. It is in the courtroom itself where the defendant's ability to avail himself of counsel is at is most important.

An appellate court reviewing a cold record is ill equipped to determine whether a fifteen minute denial of counsel prejudiced the defendant. Even where there exists overwhelming evidence that the defendant was indeed the person who pulled the trigger, the defendant's demeanor on the witness stand may well have been the most important factor in the jury's decision to return a verdict of first degree murder rather than manslaughter. How can defense counsel ever prove that had he been permitted to instruct his client not to argue with the prosecutor, the verdict would have been different? How can defense counsel demonstrate the effect a certain question would have had on the jury having failed to ask the questions because he did not know what answer his client would have given? And how can counsel prevent a

court reviewing the sufficiency of the evidence from relying upon the false exculpatory statement the defendant gave at trial, which statement the defendant would have corrected had counsel been permitted to speak with his client? Clearly harmless error analysis of any kind, particularly analysis which places upon the defendant the burden of establishing prejudice, Strickland v. Washington, 466 U.S. 668 (1984), is wholly inappropriate to any denial of counsel no matter how short the period of time. Despite the majority's opinion below, the denial of counsel can never be considered harmless.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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